80-176

Supreme Court, U. S.
FILED
AUG 6 1980
MICHAEL RODAK, JR., CLERK

No.....

IN THE

Supreme Court of the United States

October Term, 1980

DANA CORPORATION and THE ECHLIN MANUFACTURING CO.,

Appellants,

vs.

STATE OF CALIFORNIA and LEGISLATURE OF THE STATE OF CALIFORNIA, *et al.*,

Appellees.

APPEAL FROM JUDGMENT OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

JURISDICTIONAL STATEMENT.

PAUL, HASTINGS, JANOFSKY & WALKER,
DENNIS H. VAUGHN,
DONALD A. DAUCHER,
DONALD L. MORROW,
STEVEN C. KENNINGER,
555 South Flower Street, 22nd Floor,
Los Angeles, Calif. 90071.
(213) 489-4000.

Attorneys for Appellant,
Dana Corporation.

MUNGER, TOLLES & RICKERSHAUSER,
DENNIS C. BROWN,
612 South Flower Street, 5th Floor,
Los Angeles, Calif. 90016,
(213) 683-9100.

Attorneys for Appellant,
The Echlin Manufacturing Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

NO. .....

IN THE

Supreme Court of the United States

October Term, 1980

DANA CORPORATION and THE ECHLIN MANUFACTURING CO.,

Appellants,

vs.

STATE OF CALIFORNIA and LEGISLATURE OF THE STATE OF CALIFORNIA, *et al.*,

Appellees.

APPEAL FROM JUDGMENT OF THE COURT OF APPFAL OF THE STATE OF CALIFORNIA.

JURISDICTIONAL STATEMENT.

Questions Presented.

1) Whether as a matter of law the Appellees could abrogate without consequence their contracts with the Appellants by enacting legislation allegedly under the police power?

2) Whether the Appellants' contracts with the Appellees were invalid *ab initio* as an impermissible restraint on the police power of the State of California?

3) Whether the Appellants' complaints state a cause of action against the Appellees for taking of property for which the Fifth Amendment requires compensation.

4) Whether the determination by the California Court of Appeal that the California Tort Claims Act immunizes Appellees from suit by Appellants herein for violation of Appellants' constitutional rights runs contrary to the Supremacy Clause of the United States Constitution.

TABLE OF CONTENTS

Page

Questions Presented i
Opinions Below 1
Jurisdiction 1
Constitutional Provisions Involved 2
Statutory Provisions Involved 2
Statement of the Case 3
How Federal Question Is Presented 7
Reasons for Granting the Writ 10
A. The Court of Appeal's Holding That the Alleged Contracts Could, as a Matter of Law, Be Abrogated Without Consequence in the Exercise of the Appellees Police Power Ignores Decisions of This Court Applying the Contract Clause of the United States Constitution 10
B. The Contracts Between Appellees and Appellants Were Not Invalid Ab Initio 15
C. The Court of Appeal's Holding That Appellees Cannot Be Held Liable for a Taking of Property in This Case Raises a Novel Question of Law Specifically Left Unanswered by This Court Last Term 18
D. The California Tort Claims Act of 1963 Cannot Deny Appellants a Remedy for Constitutional Violations. To Allow the Clearly Erroneous Court of Appeal Ruling to Stand Would Impair the Constitutional Rights of All Who Deal With the State of California 19
1. The California Tort Claims Act Cannot Immunize the Appellees From the Require-

Page

ments of the Fifth Amendment to the United States Constitution 20

2. The California Tort Claims Act Cannot Immunize Appellees From Claims Alleging the Impairment of a Contract to Violation of the Contract Clause 22

Conclusion 23

INDEX TO APPENDICES

Minute Order of the Superior Court of California, County of Los Angeles ..... App. p. 1

Opinion of the Court of Appeal of the State of California 2

Denial of Appellant's Petition for Hearing by California Supreme Court Dated May 8, 1980 6

The NOx Legislation 7

Repeal Legislation 12

Air Resources Act, ch. 670, 1974 Cal. Legis. Serv. 1872 12

Repeal Legislation 15

Air Resources Act, ch. 957, 1975 Cal. Legis. Serv. 2474 15

The California Tort Claims Act, Cal. Claims and Actions Code §§814, 818.2, 821 19

Dana's Third Amended Complaint 20

Echlin's First Amended Complaint 39

Notice of Appeal to the Court of Appeal, Second Appellate District, State of California 58

Notice of Appeal to the Supreme Court of the State of California, Dated August 1, 1980 62

TABLE OF AUTHORITIES CITED

Cases — Page

Agins v. City of Tiburon, ... U.S. ...., 100 S.Ct. 2138 (1980) 3, 18

Allied Structural Steel Co. v. Spannous, 438 U.S. 234, 57 L.Ed.2d 727, reh. denied 439 U.S. 886, 58 L.Ed.2d 201 (1978) 11, 12, 13, 14

Applby v. Buffalo, 221 U.S. 524, 55 L.Ed. 838 (1911) 20

Chicago B & O.R. Co. v. Illinois ex rel. Grimwood, 200 U.S. 561, 50 L.Ed. 596 (1906) 20

Dale v. City of Mountain View, 55 Cal.App.3d 101, 127 Cal.Rptr. 520 (1976) 3

E & E Hauling, Inc. v. Forest Preserve Dist., etc., 613 F.2d 675 (7th Cir. 1980) 13, 14

El Paso v. Simmons, 379 U.S. 497, 13 L.Ed.2d 446, reh. denied 380 U.S. 926, 13 L.Ed.3d 813 (1965) 10

N.A.C.C.P. v. Thompson, 357 F.2d 831 (5th Cir. 1966) cert. denied 385 U.S. 820 22

Sanfilippo v. County of Santa Cruz, 415 F.Supp. 1340 (N.D. Cal. 1976) 21

United States Trust Co. v. New Jersey, 431 U.S. 1, 52 L.Ed.2d 92 (1977).... 10, 11, 12, 13, 14, 15, 16, 17

Constitution

United States Constitution, Art. 1, Sec. 10 2

United States Constitution, Art. 6, cl. 2 ..... 2, 21

United States Constitution, Fifth Amendment ..... i, 2, 9, 10, 20, 21, 22

United States Constitution, Fourteenth Amendment ... 20

Statutes

Air Resources Act of 1967, Ch. 1507, Sec. 8 (1971) Cal.Legis.Serv. 3205-06 ..... 2, 4

Page

California Government Code, Sec. 814 (West) 2
California Government Code, Sec. 818.2 (West) 2
California Government Code, Sec. 821 (West) 2
California Health and Safety Code, Sec. 39177.1 2
California Vehicle Code, Sec. 4602 (West) 2
United States Code, Title 28, Sec. 1257(2) 1

Appellants[1] respectfully pray that this Court grant this Appeal to review the judgment and opinion of the Court of Appeal of the State of California,[2] which affirmed the Superior Court's dismissal of the Appellants' complaints without leave to amend.[3] Appellants sought review of this judgment and opinion in the Supreme Court of the State of California. Hearing was denied.

OPINIONS BELOW.

The unreported Minute Order of the Superior Court of California, County of Los Angeles entered December 6, 1977 appears in the appendix at 1.

The reported opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four, filed March 13, 1980 appears in the appendix at 2.

The California Supreme Court denied the Appellants' Petition for Hearing on May 8, 1980 without opinion. The notice of that denial appears in the appendix at 6.

JURISDICTION.

The Appellants invoke this Court's jurisdiction under 28 U.S.C. Sec. 1257(2). The judgment and opinion of the Court of Appeal affirming the dismissal of Appellants' complaints with prejudice was entered on March 13, 1980. On

---

[1]Appellants were plaintiffs and appellants below. They are: Dana Corporation (hereinafter "Dana") and The Echlin Manufacturing Company (hereinafter "Echlin"). The Appellees include the defendants and appellees below. They are the State of California and the Legislature of the State of California. In addition, the Appellees include Contignition Company and Combustion Sciences, Inc., who were plaintiffs and appellants below. However, where the word Appellees is used in this jurisdictional statement it refers only to the State of California and the Legislature of the State of California.

[2]California Court of Appeal, Second Appellate District, Division Four (per Kingsley, Acting P.J.) (hereinafter "Court of Appeal").

[3]Superior Court of Los Angeles County (Hon. Jack T. Ryburn, Judge).

May 8, 1980, the California Supreme Court denied the Appellants' petition for hearing. This jurisdictional statement is filed within 90 days of that denial. Notice of Appeal was filed in the California Court of Appeal and in the California Supreme Court on August 1, 1980. Copies of those notices appear in the appendix at 58 and 62.

CONSTITUTIONAL PROVISIONS INVOLVED.

Article 1, Sec. 10 of the United States Constitution provides in pertinent part that "No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

Article 6, cl. 2 of the United States Constitution provides in pertinent part that "This Constitution, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment to the United States Constitution provides in pertinent part that "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED.

The Air Resources Act, Ch. 1507, 1971 Cal.Legis.Serv. 3205-06 (amending the Air Resources Act of 1967, Cal. Health and Safety Code §39177.1 and Cal. Vehicles Code §4602 (West)) and the repealing amendments pertinent to this action are set out in full in the appendix at 7, 12 and 15.

The relevant sections of the California Tort Claims Act of 1963 (Cal. Government Code §§814, 818.2, and 821 (West)) are set out in full in the appendix at 19.

STATEMENT OF THE CASE.

This Appeal results from the affirmance by the Court of Appeal of an order sustaining demurrers to Appellants' complaints without leave to amend. Therefore, the courts of California accepted as true the facts alleged in Appellants' complaints unless "contrary to law or to a fact of which a court may take judicial notice." *Agins v. City of Tiburon*, ... U.S. ...., 100 S.Ct. 2138, 2141 n.6 (1980) citing *Dale v. City of Mountain View*, 55 Cal.App.3d 101, 105, 127 Cal.Rptr. 520, 522 (1976). No other facts are before the court for its consideration.

The Complaints stated:

In the late 1960's, there occurred an air pollution crisis in California. Greatly contributing to this crisis was the emission of oxides of nitrogen (hereinafter "NOx") from motor vehicles manufactured in the particular model years 1966-1970. Appendix (hereinafter "A") at 21-22 and 39-41.[4] From 1968 until 1971, demand grew from various sources, including the Appellees, for action to reduce NOx emissions from 1966-1970 vehicles. (A at 22 and 41). However, devices to control such NOx emissions were not commercially available. (A at 22 and 44).

Reacting to the crisis, the Appellees, through the State of California Air Resources Board (hereinafter "ARB"), consulted with potential manufacturers, including the Appellants, to determine whether they would develop and make available devices to reduce NOx emissions for 1966-1970 automobiles. The Legislature was informed by the ARB that

---

[4]Certain citations to the appendix will be followed by two sets of page numbers. The first corresponds to the page in the Appendix at which this allegation is set forth in Dana's Third Amended Complaint. The second corresponds to the page in the Appendix at which this allegation is set forth in Echlin's First Amended Complaint.

the manufacturers would undertake such a project *if and only if the law were changed to require the installation of such devices on all 1966 to 1970 automobiles in California.* (A at 23 and 41-42).

As a result, in November, 1971, the Appellees enacted legislation (hereinafter the "NOx legislation") which required most 1966-1970 motor vehicles (hereinafter "Subject Vehicles") to be equipped with an ARB accredited NOx device not later than February 1973. (A at 23-24 and 42-43). This legislation constituted an offer to Appellants that if they would undertake to design, obtain accreditation for and manufacture sufficient numbers of NOx devices, then the Appellees would require the mandatory installation of such devices on the Subject Vehicles. (A at 32-33 and 51-52). In order to assure rapid installation of NOx devices, the Appellees enacted the NOx legislation as an urgency statute, stating:

> "This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting necessity are:
>
> Presently required emission control devices for motor vehicles of 1966 through 1970 models do not eliminate enough of the oxides of nitrogen to insure the health and safety of the majority of California citizens. It is now technically feasible to produce devices which will significantly reduce these dangerous substances. To insure that such devices are installed on most of such passenger vehicles within the shortest time possible, it is necessary to immediately begin programs for testing and approving such devices. Immediate passage of this act will also give manufacturers additional time to develop such devices." Ch. 1507, §8 (1971).

The NOx legislation vested the ARB with the authority to accredit and certify for installation on Subject Vehicles NOx devices and, while it set no absolute standard for reduction of NOx to be achieved by an accreditable device, it authorized the ARB to set such standards and to establish a mandatory installation schedule. (A at 24 and 42-43). In other words the ARB became a compliance officer, charged with responsibility for determining whether and when manufacturers had complied with the terms of the Legislature's offer.

Despite the urgency of the NOx legislation, by March 31, 1972, no company had yet submitted a device for accreditation. (A at 26 and 44-45). The ARB then wrote a letter to the manufacturers, including Appellants, which stated in part:

> "Gentlemen:
>
> The Air Resources Board, at its meeting on April 19, 1972, at Sacramento, will take up the status of NOx control devices for 1966-70 light-duty vehicles.
>
> This subject has been discussed by the Board and the staff with members of the industry for some time. The Board and staff were led to believe that devices would be available if the State chose to require their installation.
>
> The legislature was likewise informed, and as a result passed SB 578, which requires installation of NOx devices on 1966-70 light-duty vehicles by January 1973. The bill was signed by the Governor on November 16, 1971 and on November 17 the Board adopted a test procedure for accreditation.
>
> We understand several companies have undertaken testing, but no application has yet been filed with the Board. The Board wishes to find out why there are no applications and what alternatives exist to comply with

> the law and will call upon your representative at the April 19th meeting to give a brief statement for your company on the subject." (A at 26 and 44-45)

Appellants accepted Appellees' offer by designing, obtaining accreditation for and manufacturing the NOx devices. Both Appellants invested millions of dollars in the design and manufacture of smog devices at the express request of the State. The NOx devices submitted by the Appellants were accredited in August 1972. (A at 27 and 45-46).

The ARB decided that the Appellants would not be able to produce enough devices, or to establish distribution systems and train device installers in time to meet the February, 1973, installation deadline provided for in the NOx legislation. Acting under a provision of the NOx legislation which allowed delay "for extraordinary and compelling reasons," the ARB suspended the requirement that all vehicles have the devices installed by early 1973 and began working on a new schedule. (A at 27-28 and 46). The Appellants were told by the ARB that an installation schedule would be adopted if Appellants provided more information regarding production, distribution, and installation training and if Appellants committed themselves to produce the NOx devices within the time specified in the installation schedule. (A at 28 and 46). Appellants provided the information and agreed to produce sufficient devices for all subject 1966-70 vehicles in California. Whereupon the ARB adopted a schedule providing for mandatory installation of NOx devices on all Subject Vehicles by May, 1974. (A at 28 and 35).

On December 19, 1973, at the request of the Governor of California the ARB adopted a resolution delaying the installation deadline. However, in compliance with a writ of mandamus from the California Supreme Court, the ARB vacated the resolution to delay mandatory installation and

adopted an installation deadline of June 30, 1975. (A at 29 and 47-48).

By January 1, 1974, Dana and Echlin had invested approximately $10 million and $5 million, respectively, in the implementation of the NOx program at the inducement of the legislation and the express request of the ARB acting pursuant to the legislation. The cost to the Appellants included, among other things, the research and development of the devices and of the installation program, the manufacture of a large inventory of NOx devices on an expedited basis to meet the requirements of the installation schedules established by the ARB, training seminars for 11,700 Class-A mechanics, and the establishment of field offices throughout California to secure the smooth operation of the installation program. (A at 30-32 and 48-51).

On September 5, 1974 and again on April 23, 1975, the Appellees amended the Air Resources Act, (A at 29 and 48) (hereinafter "repeal legislation"). The amendments repealed the provisions which required the mandatory installation of the NOx devices on all subject vehicles and reduced to an insignificant number the motor vehicles upon which the NOx device was required to be installed. By enacting the repeal legislation the State rescinded its promise to these appellants to require the installation of NOx devices on all subject vehicles and rendered the Appellants' large inventory of NOx devices valueless.

HOW FEDERAL QUESTION IS PRESENTED.

The Appellants initiated this suit in the Superior Court of Los Angeles County for breach of contract, for taking of property without just compensation, and on three other grounds not discussed in this Appeal.

The complaint of Appellants challenged the validity of the repeal legislation as an impairment of the contractual

duties which the State had imposed upon itself in entering into contracts with Appellants and a taking of property without compensation.

The Appellees demurred to the complaints filed by Appellants on identical grounds. Appellees argued that the State of California was totally free to abrogate any contract with Appellants, without consequence, if the abrogation occurred in the form of legislation which the State contended was passed in the exercise of its police power; that any contract which limited the police power of the State was "void *ab initio*"; and that the repeal of those portions of the NOx legislation making device installation mandatory was not a taking for which any compensation was required.

The Superior Court dismissed all five causes of action alleged by the Appellants without leave to amend.

The Appellants appealed to the California Court of Appeal asserting that they alleged facts sufficient to state a claim under all five theories. The Appellants argued that the alleged contracts could not, as a matter of law, be abrogated without consequence in the alleged exercise of the State's police power and were not void *ab initio*. Appellants also pointed out, as they had in the Superior Court that even the exercise of the State's police power may be constrained by the Contract Clause of the United States Constitution. Appellants also argued that the facts alleged were sufficient to constitute a cause of action for the taking of Appellants' property without compensation.

The Court of Appeal affirmed the Superior Court's order dismissing the Appellants' complaints with prejudice on two separate grounds. First, the Court of Appeal held that the Appellees were immune from any suit seeking a remedy for impairment of contract resulting from legislation assertedly passed in the exercise of the State's police power. The Court

of Appeal also held that the California Tort Claims Act of 1963 immunized the Appellees from suit under any of the alleged theories.

Appellants herein petitioned for a hearing before the California Supreme Court, again raising the issues that are now before this Court. The Appellants argued that the Court of Appeal misconstrued the nature of the case, ignored the Contract Clause and the Fifth Amendment of the United States Constitution, and unconstitutionally expanded the California Tort Claims Act to deny Appellants a remedy for the violation of Appellants' constitutional rights by Appellees. The Supreme Court of California denied Appellants' Petition for Hearing on May 8, 1980.

REASONS FOR GRANTING THE WRIT.

The Court of Appeal for the State of California disposed of this case with two broad theories, both of which presume to provide Appellees with absolute immunity, as a matter of law from the constitutional claims asserted by the Appellants. The Court of Appeal held that "the state is not liable for the effect of legislation enacted under the police power for what the Legislature believes is a public purpose." (A-4). Second, the Court of Appeal found that regardless of the claims alleged by the Appellants, the California Tort Claims Act of 1963 provides the Appellees with "an express governmental immunity." As will be discussed below, both alleged statements of law are incorrect because they ignore the Contract Clause and the Fifth Amendment of the United States Constitution and directly conflict with this Court's interpretation of these provisions.

A. The Court of Appeal's Holding That the Alleged Contracts Could, as a Matter of Law, Be Abrogated Without Consequence in the Exercise of the Appellees Police Power Ignores Decisions of This Court Applying the Contract Clause of the United States Constitution.

The Court of Appeal's opinion incorrectly concludes that even if valid contracts existed between the Appellants and Appellees, the Appellees can not be held liable for any remedy for impairing such contracts if that abrogation was a result of the exercise of the police power of the State. This Court has made it clear that "the power of a state to modify or affect the obligation of contract is not without limit." *El Paso v. Simmons*, 379 U.S. 497, 509, 13 L.Ed.2nd 446, *reh. denied* 380 U.S. 926, 13 L.Ed.2d 813 (1965). This is so even in the exercise of the state's police powers. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 52

L.Ed.2d 92 (1977); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 57 L.Ed.2d 727, *reh. denied* 439 U.S. 886, 58 L.Ed.2d 201 (1978).

In *United States Trust Co. v. New Jersey*, 431 U.S. 1, 52 L.Ed.2d 92 (1977), this Court addressed the relationship between a state's police powers and its contractual obligations. The States of New York and New Jersey had passed legislation which restricted the uses which the Port Authority (a separate governmental entity) could make of its assets. That legislation was passed for the purpose of inducing investors to purchase Port Authority Bonds by making the investment appear more secure. The legislation, in effect, promised prospective bondholders of the Port Authority that as long as any of the bonds remained outstanding, the Port Authority could not use pledged revenues or reserves for other than permitted purposes. In 1974 New York and New Jersey determined that the Port Authority could not operate efficiently under this restriction. Therefore, in the exercise of their police power both States repealed the legislation. Bondholders sued to challenge this repeal as an unconstitutional impairment of contract.

> "*After a trial*, the Superior Court ruled that the statutory repeal was a reasonable exercise of New Jersey's police power," and therefore did not violate the impairment of contracts clauses of either the United States or New Jersey constitutions. 431 U.S. at 3. (Emphasis added.)

This Court reversed. In so doing, this Court ruled that the assertion that the repeal of the legislation was an exercise of the police power of the State was not sufficient to insulate that action from the effects of the Contract Clause of the Constitution:

> The trial court concluded that repeal of the 1962 covenant was a valid exercise of New Jersey's police power

> because repeal served important public interests in mass transportation, energy conservation, and environmental protection. (Citation omitted.) *Yet the Contract Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation.* 431 U.S. at 21. (Emphasis added.)

This Court stated that an impairment of a contract is constitutional only if it is "reasonable and necessary to serve an important public purpose." 431 U.S. at 25. In applying this standard to contracts to which the State is a party, this Court emphasized that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." 431 U.S. at 26.

In *Allied Structural Steel Co. v. Spannous*, 438 U.S. 234, 57 L.Ed.2d 727, *reh denied* 439 U.S. 886, 58 L.Ed.2d 201 (1978), this Court reiterated that the Contract Clause limits the power of the state to abridge existing contracts, even when the state relies upon its police power:

> "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. The existence and nature of those limits were clearly indicated in a series of cases in this Court arising from the efforts of the States to deal with the unprecedented emergencies brought on by the severe economic depression of the early 1930's." 438 U.S. at 242.

Allied Structural Steel involved a state's unconstitutional impairment of a private contract through the exercise of its police powers. In order to evaluate the state's interference with a private contract, this Court made a detailed factual

inquiry of *the trial court record* to determine the circumstances under which the statute had been passed, the scope and purpose of the statute and its effect upon those whose conduct it sought to prescribe. 438 U.S. at 244-51. No such inquiry was required or allowed in this case, despite the fact that this Court in both the *United States Trust Co., supra* at 22-23 and 25-26, and in *Allied Structural Steel Co. v. Spannaus, supra* at 244, noted that "*impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties.*" 438 U.S. at 244.

The Seventh Circuit in *E & E Hauling, Inc. v. Forest Preserve Dist.*, etc., 613 F.2d 675 (7th Cir. 1980), looked to the above cited Supreme court cases in setting forth the proper analysis a trial court should use to determine whether a state's impairment of its own contractual obligations is permissible. In *E & E Hauling*, the plaintiff alleged that a contract entered into by it and a county forest preserve district was impaired as a result of the promulgation and enforcement of certain ordinances subsequently passed by the district. After holding that the complaint stated a cause of action, the Court of Appeals set forth the following guidelines for the trial court to consider on remand with respect to whether the asserted impairment violated the contract clause:

> "Not all impairments of contractual obligations are unconstitutional. (Citation omitted.) Instead a court 'must attempt to reconcile the strictures of the Contract Clause with the "essential attributes of sovereign power" . . . necessarily reserved by the States to safeguard the welfare of their citizens.' *United States Trust*, 431 U.S. at 21, 97 S.Ct. at 1517, Citing *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 435,

> 54 S.Ct. 231, 78 L.Ed. 413 (1934). A state does reserve broad power to adopt regulations to protect the public without being concerned with upsetting contractual obligations. This power, however, is not unlimited. A substantial impairment will be found unconstitutional when it is shown that the legislation was not reasonable and necessary to meet an important social problem. *Allied Structural Steel*, 438 U.S. at 242-44, 98 S.Ct. 2716. (Citations omitted). In addition, the severity of the impairment 'measures the height of the hurdle the state legislation must clear.' *Allied Structural Steel*, 438 U.S. at 245, 98 S.Ct. at 2723. Thus, on remand we direct the district court, in considering whether the contract clause has been violated, to balance the District's interest in its ordinance with the degree of impairment of the plaintiff's contractual expectations." *Id.* at 681. (Footnote omitted.)

The analysis engaged in by this Court in *Allied Structural Steel* and *United States Trust Co.* shows that a state's claim that its abrogation of a contract was a proper and justifiable exercise of legitimate police power is an affirmative defense to be proven by the state at trial. This Court has laid down standards in these cases which the state must meet in order to establish that its exercise of the police power, did not violate the Contract Clause. In both *Allied Structural Steel* and *United States Trust Co.*, the states failed to meet that burden *at trial*. The Seventh circuit in *E & E Hauling* recognized the limitations placed on a state's exercise of its police powers by the Contract Clause and remanded the case to the district court for a factual determination as to whether the exercise of the police power was reasonable and necessary to meet an important social problem.

In the case at bar, the Court of Appeal found that as a matter of law the State is not liable for the effect of any legislation "enacted under the police power for what the

legislature believes is a public purpose." (A at 4) At the pleading stages, without a trial to determine the reasonableness of the Appellees' asserted exercise of its police powers, the Court of Appeal found that the repeal of the NOx legislation did not violate the Contract Clause of the Constitution. This conflicts with express rulings of this Court.

B. The Contracts Between Appellees and Appellants Were Not Invalid Ab Initio.

Appellees argued below that any agreements or contracts that were formed between the State and these Appellants to require the installation of NOx devices on vehicles in California would be invalid, *ab initio,* as an attempt to restrict future exercise the police power of the State of California. In so arguing, the Appellees cited *United States Trust Co.* for the proposition that, "the police power and the power of eminent domain were among those that could not be 'contracted away'." . . ." *Id.* at 431 U.S. at 23-24.

However, *United States Trust Co.* does not support that view. The legislation which was attacked in that case, the repeal of a prior law restricting the use of funds by the Port Authority, was an exercise of the police power of the States of New York and New Jersey. This Court determined that the contract which the states had entered into, by the passage of the original legislation, did restrict and constrain those states' police power to pass the repeal legislation.

In *United States Trust Co.*, this Court did cite earlier decisions dealing with the reserved-powers doctrine, which required "a determination of the States' power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment." *Id.* at 431 U.S. at 23 This Court then said,

> "In deciding whether a state's contract was invalid, *ab initio,* under the reserved-powers doctrine, earlier decisions relied on distinctions among the various powers of the state. Thus, the police power and the power of eminent domain were among those that could not be 'contracted away,' but the State could bind itself in the future exercise of the taxing and spending powers." *Id.* at 23-24.

However, this Court expressly avoided affirming the validity of those distinctions. It stated,

> "Such formalistic distinctions perhaps cannot be dispositive . . . ." *Id.* at 431 U.S. at 24.

The argument of Appellees below was that this formalistic distinction is dispositive of these Appellants' rights without regard to the facts or circumstances of the contractual relationship.

The contract in this case is very much like the contract in the *United States Trust Co.* case.

In *United States Trust Co.*, the states sought the public marketability of Port Authority bonds, while the Appellees sought a solution to the air pollution crisis. In *United States Trust Co.*, the states took action to insure an adequate transportation system between new Jersey and New York, while the Appellees took action to insure healthful air quality. The states in *United States Trust Co.* enacted legislation forcing the Port Authority to retain security for the outstanding bonds while the Appellees enacted legislation forcing citizens to buy the pollution control devices. The enactment of the legislation in *United States Trust Co.* was intended to encourage investment in Port Authority Bonds (431 U.S. at 17-18) while the enactment of the NOx legislation was intended to encourage investment in the design and manufacture of NOx devices. (A at 30-31 and 48-49). The states realized their objective by controlling the conduct of the

Port Authority for the benefit of the bondholders while the Appellees realized their objective by prescribing the conduct of the citizens of the State for the benefit of Petitioners, as well as for the citizens themselves.

Instead of enacting the 1962 covenant, New Jersey and New York could have guaranteed payment of interest and principal on the bonds. Such a guarantee would clearly have been an enforceable financial contract. Similarly, the Appellees could have contracted with Petitioners to purchase the NOx devices, with the Appellants intending to distribute and install the devices through their own authorized dealers. Such a financial agreement would have been as enforceable as the guarantee agreement postulated above. The point is that there are many ways to accomplish the same objective. If, as here and in *United States Trust Co.*, the subject matter of the contract centers around a financial obligation, the method which the State has chosen to accomplish its objective should not affect the enforceability of the obligation which is the basis for the agreement.

These Appellants invested approximately $15,000,000 in a smog prevention program, at the express request of the State of California. They were induced to do so by a promise from the State that the Appellants would receive an economic return. Appellants ask this Court to determine that the "formalistic distinction" recognized but not affirmed in *United States Trust Co.* may not be applied to deny them *any remedy* for the losses which they have suffered.

For example, in this case, the application of the Contract Clause to this case does not necessarily mean that the alleged exercise of the police power by the State in passing the repeal legislation need be invalidated. Appellants have sought compensation for only the amounts they expended in performing their commitments under the contract. Appellants have not demanded that the State adhere to a con-

tract that surrenders an essential attribute of its sovereignty. The granting of a less severe remedy may resolve the apparent friction between the Contract Clause and the reserved-powers doctrine.

C. The Court of Appeal's Holding That Appellees Cannot Be Held Liable for a Taking of Property in This Case Raises a Novel Question of Law Specifically Left Unanswered By This Court Last Term.

The Court of Appeal found that Appellees could not be held liable "for the effect of legislation enacted under the police power." (A-4). As applied to the takings claim asserted by the Appellants, this "basic rule" apparently reflects the application by the court of the doctrine that damages are not available in California for takings that result from inverse condemnations. In *Agins v. City of Tiburon*, ... U.S. .... , 100 S.Ct. 2138 (1980), this Court specifically left unanswered the question whether the State of California could limit the remedies available for an inverse condemnation that constitutes a taking to mandamus and declaratory judgment: "The State Supreme Court determined that the Appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." *Id.* at 2142-43. The immediate case provides a particularly good forum for this Court to decide this issue.

Appellants seek compensation from Appellees for the alleged taking of their property pursuant to an inverse condemnation. As a result of Appellees' alleged exercise of their police powers in amending the NOx legislation, Ap-

pellants have been denied any substantial or reasonable use for the NOx devices and technology and have lost the contractual rights whereby Appellees would require all owners of the Subject Vehicles to install NOx devices. Appellants seek damages for this taking by Appellees because no other remedy can provide just compensation to the Appellants. Repeal of the amendments to the NOx legislation will not serve to restore to the Appellants the value of the property taken. The contract between the Appellants and Appellees required the rapid installation of smog devices on cars built in the years 1966 to 1970. In 1974, there were hundreds of thousands of these cars on the road; in 1980, there are certainly fewer. By the time this case is resolved, there may well be no such cars remaining. Because of the temporal nature of the value of Appellants' property, Appellants cannot be justly compensated by any remedy except damages. To allow the State of California to limit relief available for an inverse condemnation that constitutes a taking in this case would leave Appellants without any effective remedy for such a taking.

D. The California Tort Claims Act of 1963 Cannot Deny Appellants a Remedy for Constitutional Violations. To Allow the Clearly Erroneous Court of Appeal Ruling to Stand Would Impair the Constitutional Rights of All Who Deal With the State of California.

The Court of Appeal held that despite the claims asserted by the Appellants "the case at bench falls squarely within an express governmental immunity" found in the California

Torts Claims Act of 1963.[5] By resting its decision on the California immunity statutes the Court of Appeal denied the Appellants any remedy for the alleged violation of their rights under the United States Constitution. The Court of Appeal's holding must be interpreted to state that even if Appellees took Appellants' property without just compensation and even if the Appellees impaired their contracts with Appellants in violation of the Contract Clause, the California Tort Claims Act immunizes the Appellees from the dictates of the United States Constitution and denies the Appellants any remedy for the alleged violations of their constitutional rights.

1. The California Tort Claims Act Cannot Immunize the Appellees from the Requirements of the Fifth Amendment to the United States Constitution.

The Fifth and Fourteenth Amendments to the United States Constitution prohibit a state from taking property for public use without just compensation. *See, e.g., Chicago, B. & Q. R. Co. v. Illinois ex rel Grimwood,* 200 U.S. 561, 50 L.Ed. 596 (1906); *Appleby v. Buffalo,* 221 U.S. 524, 55 L.Ed. 838 (1911). Appellants claim that Appellees took their property without just compensation in violation of the Fifth Amendment. The Court of Appeal held, however, that the Appellees were immune from liability for the alleged

---

[5]The Court of Appeal stated:

> "No matter under what ingenious theory put forth, the case at bench falls squarely within an express governmental immunity. Sections 818.2 and 821 of the Government Code read as Government Code read as follows:
>
> A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.
>
> A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment."

Those sections control the case at bench." (A-5).

taking under the California Tort Claims Act and affirmed the dismissal of Appellants' complaints. In so doing the Court held a state statute supreme to the Fifth Amendment. This clearly contravenes the dictates of the Supremacy Clause which provides that, "This Constitution, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. 6, cl. 2.

A claim of immunity similar to that raised by the Appellees was faced and disposed of by the court in *Sanfilippo v. County of Santa Cruz,* 415 F.Supp. 1340 (N.D. Cal. 1976). The court stated:

> "Defendants assert that under California law public entities are immune from suits for monetary damages growing out of public enactments or permit approval procedures. While this may be true in many areas of tort law, such an immunity doctrine does not apply here. It is an elementary proposition that governmental entities are not immune from actions brought under constitutional provisions guaranteeing just compensation for public takings of private property. To hold, as defendants assert, that all land use regulations are by definition valid discretionary legislative acts would be to ignore the constitutional requirement that takings be accompanied by just compensation and to eliminate actions for inverse condemnation. Irrespective whether protection against inverse condemnation is afforded under the California Constitution, California immunity legislation could not limit the substantive rights of landowners under the 5th and 14th Amendments of the United States Constitution." *Id.* at 1343. (Footnote omitted.)

Appellants implore this Court to reverse the Court of Appeal's holding that provides Appellees immunity from the Appellants' Fifth Amendment claim. The implications of such a clearly erroneous holding are staggering.

2. The California Tort Claims Act Cannot Immunize Appellees from Claims Alleging the Impairment of a Contract to Violation of the Contract Clause.

The Court of Appeal also affirmed the dismissal with prejudice of the Appellants' contracts claim on the grounds that the State enjoyed an absolute immunity under the California Torts Claims Act. In so doing, the court implicity found that even if the alleged contracts existed and even if the Appellees impaired the contracts in violation of the Contract Clause of the United States Constitution, the Appellants nevertheless were not entitled to a remedy for the violation of their constitutional rights. Just as with the Appellants' Fifth Amendment claim, to hold that the State statute immunizes the Appellees from suit for the violation of Appellants' rights under the Contract Clause denies Appellants their constitutional rights and conflicts with the Supremacy Clause. As stated by the Fifth Circuit in *N.A.C.C.P. v. Thompson,* 357 F.2d 831 (5th Cir. 1966), *cert. denied* 385 U.S. 820, "any State law, which is in conflict with the United States Constitution or a law enacted by Congress in pursuance thereof, cannot be enforced. Nor can a valid State law be applied in a way to thwart the exercise of a right guaranteed by the Constitution and laws enacted by Congress in pursuance thereof." *Id.* at 833. The Court in this case interpreted a State law so as to thwart the Appellants' attempt to vindicate their rights under the Contract Clause of the United States Constitution. If this Court fails to reverse this decision, the State of California as well

as the other states will be free to violate constitutional rights with immunity by enacting statutes such as the California Tort Claims Act.

CONCLUSION.

For the foregoing reasons, Appellants pray this Court to note probable jurisdiction of this Appeal.

Respectfully submitted,

PAUL, HASTINGS, JANOFSKY & WALKER,
DENNIS H. VAUGHN,
DONALD A. DAUCHER,
DONALD L. MORROW,
STEVEN C. KENNINGER,
Attorneys for Appellant,
Dana Corporation.

MUNGER, TOLLES &
RICKERSHAUSER,
DENNIS C. BROWN,
Attorneys for Appellant,
The Echlin Manufacturing Company.

No. .....

IN THE

Supreme Court of the United States

October Term, 1980

DANA CORPORATION and THE ECHLIN MANUFACTURING CO.,

Appellants,

vs.

STATE OF CALIFORNIA and LEGISLATURE OF THE STATE OF CALIFORNIA, *et al.*,

Appellees.

APPENDIX.

APPEAL FROM JUDGMENT OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

Minute Order of The Superior Court of California, County of Los Angeles.

Superior Court of California, County of Los Angeles. Dept. 82.

Date: December 6, 1977.

Honorable: Jack T. Ryburn, Judge.

M. Simpson, Deputy Clerk.

Dana Corporation, etc., vs. State of California, et al. C 158 741.

NATURE OF PROCEEDINGS.

C 175 498

C 176 787

C 177 272

In the matter heretofore submitted for decision on December 2, 1977, the Court now rules as follows:

Demurrer of defendants State of California, Edmund G. Brown, Jr., as Governor of California, and the California Legislature is sustained on grounds as set forth below. No leave to amend.

The State has correctly set forth the legal doctrines upon which its demurrers are based. The legislature acted within its power, it cannot be estopped, the Air Resources Board was not authorized to bind the State to a contract, and any promise not to modify prior legislation is void.

The facts alleged by plaintiffs upon which the ruling on demurrer must be based, go beyond a business committing itself in reliance on the passage of legislation. Plaintiffs allege legislation passed to abate a crisis and amendments to that legislation to induce development and production of NOx devices. They also allege cooperation between plaintiffs and Air Resources Board and accreditation of certain NOx devices manufactured by the plaintiffs. Plaintiffs' reliance cannot be disputed,

but despite a sympathetic approach, this Court has reluctantly concluded that plaintiffs have not and cannot state a cause of action for their loss.

The argument that the loss should be spread among all of the taxpayers of the state is one that can be made to the Legislature, but is not a basis for overruling defendants' demurrers, nor is the fact that the Legislature may find the business community much less willing to cooperate under similar circumstances in the future.

Counsel Joel Moskowitz is to give notice, and is to prepare an order of dismissal pursuant to section 581(3) of the Code of Civil Procedure.

A copy of this minute order is mailed to appearing counsel.

Opinion of the Court of Appeal of the State of California.

In the Court of Appeal of the State of California. Second Appellate District, Division Four.

Dana Corporation, *et al., Plaintiffs and Appellants*, v. State of California, *et al., Defendants and Respondents.*

---

2 Civ. No. 55838, (Super. Ct. No. C-158, 741 Consolidated with Nos. C-176,787, C-175,498. C-177,272).

Filed: March 13, 1980.

APPEALS from judgments (orders of dismissal) of the Superior Court, Los Angeles County, Jack T. Ryburn, Judge. Affirmed.

Paul, Hastings, Janofsky & Walker, Dennis H. Vaughn, Donald A. Daucher and Steven C. Kenninger for Plaintiff and Appellant Dana Corporation.

Munger, Tolles & Rickerschauser and Dennis C. Brown for Plaintiff and Appellant Echlin Manufacturing Company.

Egerman, Brown & Rosen and Philip M. Brown for Plaintiff and Appellant Contignitron Company.

No appearance for Plaintiff and Appellant Combustion Schiences. [SIC]

George Deukemjian, Attorney General, R.H. Connett, Assistant Attorney General, and Joel S. Moskowitz, Deputy Attorneys General, for Defendants and Respondents.

Plaintiffs appeal from judgments (orders of dismissal) entered after demurrers to their complaints were sustained without leave to amend. We affirm.

In these consolidated actions, the plaintiffs seek damages from the State of California and the Legislature, for repeal of certain legislation. In essence, the complaints (third amended complaint) allege the following:

In November 1971 the Legislature, as part of legislation intended to alleviate the problem of air pollution caused by automobiles, enacted an amendment to the Air Resources Act (c.1507, Laws of 1971), empowering the Air Resources Board to adopt standards regulating the emission of oxides of nitrogen (NOx) and requiring the installation of devices designed to accomplish that end. There followed a long period during which the board aggressively sought manufacturers (including these plaintiffs) to conduct the necessary studies to permit the manufacture of controls, saleable at a reasonable price. During that period, the board also adopted and amended regulations setting standards for the desired devices and, from time to time, extending the date when compulsory installation of such devices would be required. Plaintiffs, in reliance on the statute, the regulations and the importunities of the board, expended substantial sums in designing the type of devices involved and, utimately, secured approval of most of the devices so designed. In 1974, the Legislature repealed the NOx legislation, ex-

cept as to a minor number of motor vehicles. As a result, the market for the devices designed by plaintiffs and approved by the Board ceased to exist, causing plaintiffs to lose the monies expended by them on the NOx program.

Demurrers to the complaints were sustained without leave to amend and this appeal followed. We affirm the dismissals.

Plaintiffs attempt to claim a right of recovery on various theories. All of the claims run afoul of the basic rule that the state is not liable for the effect of legislation enacted under the police power for what the Legislature believes is a public purpose. Plaintiffs here contend that the doctrine is subject to exceptions, citing to us two cases: *United States Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1 and *Furey v. City of Sacramento* (1979) 24 Cal.3d 862. Neither case is in point here.

In *United States Trust*, bonds had been sold by an agency of the state, under a statute which strictly limited the purposes for which the capital and earnings could be used, thus insuring to the bond holders a reasonable expectancy of repayment. When the state attempted to broaden the permissible uses, the Supreme Court held that the statue under which the bonds were issued was part of the bond contract and could not be changed to the detriment of the bond holders. No such contract appears here.

In *Furey* the city had collected money from a landowner for the express purpose of constructing a sewage system useful only if the area was to be zoned industrial. When the city zoned the area for other uses, for which the sewer system was not needed, the Supreme Court held that it was obligated to refund the money paid for the, now useless, sewer system. Again, the case is not in point; it is not alleged, and could not be alleged, that the state has ever

received any money from the plaintiffs, or that it has, in effect, divered [SIC] plaintiffs' money to an improper use.

All that plaintiffs have alleged, or could allege, is that the Legislature, in 1971, thought that requiring NOx devices on old cars was desirable and that, by 1974, the then Legislature thought that such a requirement was not desirable. A Legislature is not liable, nor is the state liable, for a change in its perception of public interest. Many things once thought desirable or even to be encouraged, are later thought to be undesirable and to be discouraged. An investment under the earlier legislation is not protected against a change in the Legislature's views of desirability.

No matter under what ingenious theory put forth, the case at bench falls squarely within an express governmental immunity. Section 818.2 and 821 of the Government Code read as follows:

"A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

"A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment."

Those sections control the case at bench.

The judgments (orders of dismissal) are affirmed.

CERTIFIED FOR PUBLICATION.

Kingsley, *Acting P.J.*

We concur:

Jefferson (Bernard), *J.**

Burke (Michael L.), *J.**

---

*Assigned by the Chief Justice of California.

*Assigned by the Chief Justice of California.

Denial of Appellant's Petition for Hearing by California Supreme Court Dated May 8, 1980.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

I have this day filed Order May 8, 1980 Hearing Denied.

In re: 2 Civ. No. 55838 Dana Corporation, etc., et al. vs. State of California etc.

Respectfully,
Clerk

The NOx Legislation.

Air Pollution—Exhaust Emission Devices

Chapter 1507

Senate Bill No. 578

An act to add Sections 39107.6, 39177.1, 39177.2, 39177.3, and 39177.4 to the Health and Safety Code, and to amend Section 4602 of the Vehicle Code, relating to air pollution, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

SEC. 1. Section 39107.6 is added to the Health and Safety Code, to read: 39107.6.

Notwithstanding Section 39107, the board shall set standards for devices to significantly reduce the emission of oxides of nitrogen from the exhaust of 1966 through 1970 model year motor vehicles, as determined by the board from a representative sampling of such vehicles, which the board has found to be necessary and technologically feasible to carry out the purposes of this part.

In setting standards under this section, the primary consideration shall be the greatest possible reduction of oxides of nitrogen.

SEC. 2. Section 39177.1 is added to the Health and Safety Code, to read:

39177.1.

(a) Whenever an exhaust emission control device meeting the standards established by the board under Section 39107.6 is accredited pursuant to the provisions of this article and is available for installation as determined by the board, every 1966 through 1970 model year motor vehicle having a manufacturer's gross vehicle weight rating of under 6,001 pounds, which is subject to registration in this state, shall be equipped with such accredited exhaust emission

control device in accordance with a schedule of installation to be determined by regulation adopted by the board, in consulation [sic] with the Department of the California Highway Patrol and the Department of Motor Vehicles.

(b) Enforcement of the provisions of subdivision (a) shall be as follows:

(1) Vehicle inspections shall be conducted pursuant to Section 2814 of the Vehicle Code.

(2) Certificates of compliance shall be required upon initial registration, and upon transfer of ownership and registration pursuant to Section 4000.1 of the Vehicle Code.

(3) Certificates of compliance shall be required upon renewal of registration for the year 1973, pursuant to Section 4602 of the Vehicle Code.

(4) By such other authorized means as the board, the Department of Motor Vehicles, and the Department of the California Highway Patrol find practicable.

(c) After one or more devices are initially accredited, no device shall be accredited which is less effective than the one or ones initially accredited. Any subsequent accreditation of a more effective device shall not affect the accreditation of a previously accredited device.

SEC. 3. Section 39177.2 is added to the Health and Safety Code, to read:

39177.2.

The provisions of Section 39177.1 shall not apply to any motor vehicle which, on the effective date of this section, is equipped with a device or devices which meet the requirements of subdivision (c) of Section 39101.5, as determined by the board, or which is exempted by the board pursuant to Section 39177.

SEC. 4. Section 39177.3 is added to the Health and Safety Code, to read:

39177.3.

In accrediting devices, pursuant to Section 39177.1, the board shall, in establishing tests and procedures, adopt standards, including, but not limited to, the following:

(a) An accredited exhaust emission control device shall not cost more than thirty-five dollars ($35), including the cost of installation.

(b) An accredited exhaust emission control device shall not require maintainence more than once each 12,000 miles, and such maintenance shall not cost more than fifteen dollars ($15), including the cost of parts and labor.

(c) An accredited exhaust control device shall equal or exceed the performance criteria established by the board for devices for new motor vehicles or, in the alternative, have an expected useful life of at least 50,000 miles of operation.

(d) The manufacturer of an exhaust emission control device accredited pursuant to this article shall include with the sale of such device instructions setting forth what steps the purchaser should take to maintain such device in proper working condition.

SEC. 5. Section 39177.4 is added to the Health and Safety Code, to read:

39177.4.

(a) Any manufacturer of a device required by Section 39177.1 shall, as a condition of accreditation of such device by the board, agree that until there are two or more accredited devices suitable for installation on motor vehicles of the same classification, such classification to be determined by the board, the manufacturer shall, with respect to his device for such classification of motor vehicles, either: (1) agree to enter into such cross-licensing or other agreements as the board determines are necessary to insure adequate competition among manufacturers of such devices to protect the public interest; or (2) agree as a condition to

such accreditation that, if only one such device from one manufacturer is made available for sale to the public, the board shall, taking into consideration the cost of manufacturing the device and the manufacturer's suggested retail price, and in order to protect the public interest, determine the fair and reasonable retail price of such device and may require, as a condition to continued accreditation of such device, that the retail price of such device including installation, not exceed such price as determined by the board. In either event, the retail price so determined by the board for a device required by Section 39177.1 shall not be in excess of thirty-five dollars ($35) per vehicle, installed.

(b) Accreditation may be revoked by the board after a public hearing for which notice has been given to the applicant who obtained the accreditation, if the actual cost of the device installed exceeds the cost, installed, estimated, or agreed to by such applicant.

SEC. 6. Section 4602 of the Vehicle Code is amended to read:

4602.

(*a*) Application for renewal of a vehicle registration expiring on the 31st day of December shall be made by the owner not later than midnight of the first Friday in February succeeding the expiration date and shall be made by presentation of the registration card last issued for the vehicle or by presentation of a potential registration card issued by the department for use at the time of renewal and by payment of the full annual fee for the vehicle as provided in this code.

(*b*) *The department shall require, upon 1973 renewal of registration of any motor vehicle subject to Section 39177.1 of the Health and Safety Code, a valid certificate of compliance from a licensed motor vehicle pollution control de-*

vice installation and inspection station indicating that such vehicle is properly equipped with a motor vehicle pollution control device which is in proper operating condition and which is of a type that has been accredited by the State Air Resources Board pursuant to Section 39177.1 of the Health and Safety Code. For extraordinary and compelling reasons only, the State Air Resources Board may, by regulation, after a public hearing, defer or delete the requirement of certificates of compliance required pursuant to this subdivision. In such event, the board may adjust the schedule of installation adopted pursuant to subdivision (a) of Section 39177.1 of the Health and Safety Code and shall immediately report to the Governor and the Legislature the actions taken and the reasons therefor.

SEC. 7. The State Air Resources Board, the Department of Motor Vehicles, and the Department of the California Highway Patrol shall by all practicable means at their disposal advise the motoring public of the provisions of this act.

SEC. 8. [Urgency statute]

Approved and filed Nov. 12, 1971.

REPEAL LEGISLATION.

Air Resources Act, ch. 670, 1974 Cal. Legis. Serv. 1872.

Motor Vehicles—Air Pollution

Chapter 670

Senate Bill No. 2471

An act to amend Section 39177.1 of the Health and Safety Code, and to amend and repeal Section 4602, as amended by Chapter 1507 of the Statutes of 1971, of, and to amend Section 4602, as amended by Chapter 889 of the Statutes of 1973, of, the Vehicle Code, relating to air pollution.

LEGISLATIVE COUNSEL'S DIGEST

Requires the installation of oxides of nitrogen exhaust emission control devices on all 1966 through 1970 model year motor vehicles having a manufacturer's gross vehicle weight rating of under 6,001 pounds, registered in any county included, in whole or in part, within the South Coast Air Basin, in accordance with a schedule of installation adopted in July 1974 by the State Air Resources Board, and on all such motor vehicles registered in the other counties upon initial registration and upon transfer of ownership and registration, rather than on all such vehicles subject to registration in the state, in accordance with such a schedule.

Makes related changes.

The people of the State of California do enact as follows:

SECTION 1. Section 39177.1 of the Health and Safety Code is amended to read: 39177.1

(a) Whenever an exhaust emission control device meeting the standards established by the board under Section 39107.6 is accredited pursuant to the provisions of this article and is available for installation as determined by the board, every 1966 through 1970 model year motor vehicle having a manufacturer's gross vehicle weight rating of under

6,001 pounds * * * shall be equipped with such *an* accredited exhaust emission control device * * * *as follows:*

(1) If registered in any county included, in whole or in part, within the South Coast Air Basin, as defined by the board, in accordance with the schedule of installation adopted by regulation by the board in July 1974.

(2) If registered in any other county, upon initial registration and upon transfer of ownership and registration.

(b) Enforcement of the provisions of subdivision (a) shall be as follows:

(1) Vehicle inspections shall be conducted pursuant to Section 2814 of the Vehicle Code.

(2) Certificates of compliance shall be required upon initial registration, and upon transfer of ownership and registration pursuant to Section 4000.1 of the Vehicle Code.

(3) Certificates of compliance shall be required upon renewal of registration for the year * * * *1976*, pursuant to Section 4602 of the Vehicle Code, for such motor *vehicles registered in any county included, in whole or in part, within the South Coast Air Basin, as defined by the board.*

(4) By such other authorized means as the board, the Department of Motor Vehicles, and the Department of the California Highway Patrol find practicable.

(c) After one or more devices are initially accredited, no device shall be accredited which is less effective than the one or ones initially accredited. Any subsequent accreditation of a more effective device shall not affect the accreditation of a previously accredited device.

SEC. 2. Section 4602, as amended by Chapter 1507 of the Statutes of 1971, of the Vehicle Code is amended to read:

4602.

* * * Application for renewal of a vehicle registra-

tion expiration on the 31st day of December shall be made by the owner not later than midnight of the first Friday in February succeeding the expiration date and shall be made by presentation of the registration card last issued for the vehicle or by presentation of a potential registration card issued by the department for use at the time of renewal and by payment of the full annual fee for the vehicle as provided in this code.

* * * *This section shall remain in effect only until March 10, 1975, and as of that date is repealed.*

SEC. 3. Section 4602, as amended by Chapter 889 of the Statutes of 1973, of the Vehicle Code is amended to read:

4602.

* * * Application for renewal of a vehicle registration shall be made by the owner not later than midnight of the expiration date, and shall be made by presentation of the registration card last issued for the vehicle or by presentation of a potential registration card issued by the department for use at the time of renewal and by payment of the full registration year fee for the vehicle as provided in this code.

* * * *This section shall become operative on March 10, 1975.*

Approved and filed Sept. 5, 1974.

REPEAL LEGISLATION.

Air Resources Act, ch. 957, 1975 Cal. Legis. Serv. 2474.

Air Pollution—Recodification

Chapter 957

Assembly Bill No. 1758

An act to amend Sections 9889.15, 9889.17, 9889.18, and 9889.51 of the Business and Professions Code; to amend Sections 4477, 6253, 11017, and 14808.5 of the Government Code; to repeal Chapter 2 (commencing with Section 24198) and Chapter 2.5 (commencing with Section 24345) of Division 20 of, to repeal Division 26 (commencing with Section 39000), Division 27 (commencing with Section 39600), Division 28 (commencing with Section 39800), and Division 30 (commencing with Section 40000) of, and to add Division 26 (commencing with Section 39000), Division 27 (commencing with Section 44500) and Division 28 (commencing with Section 46000) to, the Health and Safety Code; to amend Section 201.5 and 10753 of the Revenue and Taxation Code; to amend Sections 2814, 4000, 4000.1, 4000.2, 4750, 9250.5, 11519, 24007, 24007.5, 27156, and 27156.1 of, and to amend and repeal Section 4602, as amended by Section 2 of Chapter 670 of the Statutes of 1974, of, and to amend Section 4602, as amended by Section 3 of Chapter 670 of the Statutes of 1974, of, the Vehicle Code; and to repeal Section 3 of Chapter 1599 of the Statutes of 1970, relating to air pollution.

LEGISLATIVE COUNSEL'S DIGEST

Existing law contains provisions regarding air pollution and the authority, duties, and responsibilities of the State Air Resources Board and local air pollution control districts.

This bill would repeal and reenact, with various substantive changes, provisions regarding air pullution contained in the Health and Safety Code, and make conforming

changes in the Health and Safety Code and in cross-references in provisions in various other codes.

This bill provides that no appropriation is made nor any obligation created for the reimbursement of any local agency for any costs by it pursuant to the bill.

The people of the State of California do enact as follows:

Article 2. Certified Device Installation

43654.

Every 1966 through 1970 light duty motor vehicle, subject to registration in this state, shall be equipped with a certified device to control its exhaust emission of oxides of nitrogen upon initial registration and upon transfer of ownership and registration.

SEC. 22. Section 4000.1 of the Vehicle Code is amended to read:

4000.1

(a) The department shall require, pursuant to law or regulation of the State Air Resources Board adopted pursuant to Section * * * *43655* of the Health and Safety Code, upon initial registration, and upon transfer of ownership and registration, of any motor vehicle subject to * * * *Part 5* (commencing with Section * * * *43000*) of * * * Division 26 of the Health and Safety Code, a valid certificate of compliance from a licensed motor vehicle pollution control device installation and inspection station indicating that such vehicle is properly equipped with a motor vehicle pollution control device or devices which are in proper operating condition and which are in compliance with the provisions of * * * *Part 5* (commencing with Section * * * *43000*) of * * * Division 26 of the Health and Safety Code.

With respect to new vehicles having a gross vehicle weight to 6,001 pounds or less, the department shall accept

a statement completed pursuant to subdivision (b) of Section 24007 in lieu of the certificate of compliance.

The provisions of this section shall not apply to a transfer of ownership and registration when the transferor is either the parent, grandparent, child, or spouse of the transferee, when a vehicle registered to a sole proprietorship is transferred to such proprietor as owner, or when the transfer is between companies whose principal business is leasing vehicles, if there is no change in the lessee or operator of the vehicle.

(b) The State Air Resources Board * * * , under * * * *Part 5* (commencing with section * * * *43000*) of * * * Division 26 of the Health and Safety Code, may exempt designated classifications of motor vehicles from the provisions of subdivision (a) as they deem necessary, and shall notify the department of such action * * *.

SEC. 23. Section 4000.2 of the Vehicle Code is amended to read:

4000.2.

The department shall require upon registration of a motor vehicle subject to * * * *Part 5* (commencing with Section * * **43000*) of * * * Division 26 of the Health and Safety Code, previously registered outside this state, a valid certificate of compliance from a licensed motor vehicle pollution control device installation and inspection station indicating that such vehicle is properly equipped with a motor vehicle pollution control device or devices which are in proper operating condition and which are in compliance with the provisions of * * * *that part*.

SEC. 24. Section 4602 of the Vehicle Code, as amended by Section 2 of Chapter 670 of the Statutes of 1974, is amended to read:

4602.

Application for renewal of a vehicle registration *expiring on the 31st day of December* shall be made by the owner not later than midnight of the *first Friday in February succeeding the* expiration date and shall be made by presentation of the registration card last issued for the vehicle or by presentation of a potential registration card issued by the department for use at the time of renewal and by payment of the full *annual* fee for the vehicle as provided in this code.

This section shall *remain in effect only until March 8, 1976, and as of that date is repealed.*

The California Tort Claims Act, Cal. Claims and Actions Code §§814, 818.2, 821.

§ 814. Effect upon liability based on contract or right to relief other than money or damages. Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee (Added Stats. 1963, c. 1681, p. 3267, § 1.)

§ 818.2 Adoption or failure to adopt or enforce enactment. A public entity is not liable for an injury caused by adopting or failing to adopt an enactment of by failing to enforce any law. (Added Stats. 1963, c. 1681, p. 3268, § 1.)

§ 821. Adoption or failure to adopt or enforce enactment. A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment. (Added Stats. 1963, c. 1681, p. 3269, § 1.)

Dana's Third Amended Complaint.

Superior Court of the State of California, for the County of Los Angeles.

Dana Corporation, a corporation, Plaintiff, vs. State of California, the Legislature of the State of California, and Does I through XXV, Defendants. No. C 158 741.

Filed: Aug. 11, 1977.

1. At all times mentioned herein Plaintiff DANA CORPORATION (hereinafter referred to as "Dana") was and now is a corporation organized and existing under the laws of the State of Virginia, and authorized to do business in the State of California.

2. At all times mentioned herein Defendant STATE OF CALIFORNIA (hereinafter referred to as the "State") was and is a state of the United States of America.

3. At all times mentioned herein defendant LEGISLATURE OF THE STATE OF CALIFORNIA (hereinafter referred to as the "Legislature") was and now is a governmental unit created by the California Constitution.

4. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants named herein as Does I through XXV are unknown to Plaintiff, which therefore sues said Defendants by such fictitious names. Plaintiff will amend this Complaint to show their names and capacities when the same have been ascertained. Hereinafter Defendants STATE, LEGISLATURE, and DOES I through XXV will be collectively referred to as "Defendants".

5. At all times mentioned herein, each defendant was and now is an agent of each other and of every other defendant herein, and as such agent was acting within the course and scope of its employment at the time and times herein alleged.

6. In the late 1960's, air pollution in California reached crisis levels. A significant contributor to this crisis was the emission of various pollutants from motor vehicles operating in the state.

7. In response to this crisis, Defendants caused to be enacted, in 1967, the Mulfold-Carrell Air Resources Act (hereinafter referred to as the "Air Resources Act"), California Health and Safety Code §§ 39000 *et seq*. This act established the Air Resources Board (hereinafter referred to as the "ARB").

8. In further response to this crisis, Defendants caused to be enacted the Pure Air Act of 1968 (hereinafter ferred [sic] to as the "Pure Air Act"), which amended the Air Resources Act to specifically require the reduction of pollution from motor vehicles.

9. In passing the Pure Air Act, the Defendants found:

> "(a) That the emission of pollutants from motor vehicles is the primary cause of air pollution in many portions of the State.
>
> (b) That the control and elimination of such pollutants is of prime importance for the protection and preservation of the public health and well-being, and for the prevention of irritation to the senses, interference with visibility, and damage of vegetation and property.
>
> (c) That the State has a responsibility to establish uniform procedures for compliance with standards which control or eliminate such pollutants.
>
> (d) That the California goal for pure air quality is the achievement of an atmosphere with no significant detectable adverse effect from motor vehicle air pollution on health, welfare and the quality of life and property by 1975.

(e) That vehicle emission standards applied to new motor vehicles and to used motor vehicles equipped with emission control devices are standards with which all such vehicles shall comply subject to the approval, accreditation, and certification provisions of this part." Ch. 764, §8 (1968) (Health and Safety Code, §39081).

10. The Pure Air Act required the ARB to accredit and certify for installation on automobiles, devices which reduced the emissions of each of three particular pollutants — carbon monoxide, hydrocarbons and oxides of nitrogen — below certain specifically defined absolute standards. Ch. 764, §8 (1968) (as amended, Health and Safety Code, §39107).

11. During the period from 1968 until 1971, vehicles manufactured in model years 1966 through 1970 (hereinafter referred to as "1966-1970 vehicles") were particularly significant polluters. Their factory installed pollution control equipment did reduce the emission of carbon monoxide and hydrocarbons, but caused a significant increase in the emission of oxides of nitrogen (hereinafter referred to as "NOx"), a primary component in the chemical reaction which leads to photochemical smog.

12. During the period from 1968 until 1971, devices to reduce NOx emissions (hereinafter referred to as "NOx device[s]") suitable for installation on 1966-1970 vehicles were not commercially available in California.

13. The Pure Air Act gave the ARB no authority to vary its emission device standards or accredit a device which reduced only NOx emissions.

14. During the period from 1968 until 1971, demand grew from various sources, including the Defendants, for action which would lead to the reduction of NOx emissions from 1966-1970 vehicles.

15. During the period from 1968 until 1971, the ARB and its staff consulted potential manufacturers to determine whether these manufacturers could develop, and make available, NOx devices for 1966-1970 vehicles.

16. The ARB was informed by potential manufacturers that NOx devices would be developed, and made available, if the law were changed to allow the accreditation of NOx devices and to require the installation of accredited NOx devices on all 1966-1970 automobiles in California.

17. The ARB requested such legislation and supported its passage. In conformance with the ARB request, the Legislature, in November, 1971, amended the Air Resources Act, Ch. 1507 (1971) (said amendment is hereinafter referred to as the "NOx Legislation").

18. One purpose of the NOx Legislation was to encourage and induce the development, accreditation and production of NOx devices by manufacturers by requiring the installation of such devices as soon as they were available. Its urgency section provided:

> "This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting necessity are:
>
> Presently required emission control devices for motor vehicles of 1966 through 1970 models do not eliminate enough of the oxides of nitrogen to insure the health and safety of the majority of California citizens. It is now technically feasible to produce devices which will significantly reduce these dangerous substances. To insure that such devices are installed on most of such passenger vehicles within the shortest time possible, it is necessary to immediately begin programs for testing and approving such devices. Immediate pas-

sage of this act will also give manufacturers additional time to develop such devices." Ch. 1507, §8 (1971).

19. The NOx Legislation vested the ARB with the authorty to accredit NOx devices for installation on 1966-1970 vehicles having a manufacturer's gross vehicle weight rating of under 6,001 pounds (hereinafter referred to as "Subject Vehicles"). It further required every Subject Vehicle to be equipped with an NOx device in accordance with a schedule to be developed by the ARB. The NOx Legislation specifically required that all Subject Vehicles be equipped with a device upon renewal of registration in 1973, absent extraordinary and compelling reasons.

20. The NOx Legislation set no absolute standards for the reduction of NOx. Instead, it sought to encourage the development of the best possible devices, given the constraints of urgency and of technological and economic feasibility.

21. To accomplish this purpose, the ARB was authorized to determine the standard for NOx reduction necessary for accreditation of an NOx device:

> "Notwithstanding [Health and Safety Code] Section 39107, [which had set a specifically defined absolute NOx standard,] the board shall set standards for devices to significantly reduce the emission of oxides of nitrogen from 1966 through 1970 model year vehicles, as determined by the board from a representative sampling of such vehicles, which the board has found necessary and technologically feasible to carry out the purposes of this part.
>
> In setting standards under this Section, the primary consideration shall be the greatest possible reduction of oxides of nitrogen." Ch.1507, § 1 (1971).

22. To further accomplish this purpose, the NOx Legislation provided that no NOx device could be accredited which was less effective than any already accredited.

23. For several months prior to the passage of the NOx Legislation and in anticipation thereof, the ARB consulted with potential manufacturers to develop procedures for evaluating NOx devices and to implement an NOx reduction program.

24. At the ARB meeting on November 17, 1971, the ARB adopted procedures for evaluating NOx devices. At the same meeting, the ARB, speaking through its Chairman, noted the passage of the NOx Legislation and urged "the auto industry to submit devices for approval at an early date since many of the manufacturers indicated they would do so if the law were changed."

25. Standards for the reduction of NOx emissions required for accreditation of NOx devices were not set at the November 17 meeting because the ARB did not possess sufficient information on the effectiveness of NOx devices which would be technologically and economically feasible. Thereafter, the ARB continued its solicitation of information from manufacturers with regard to potential NOx devices. In December, 1971, the ARB wrote various manufacturers stating, "[b]efore setting standards for [NOx] devices, the Board wishes to know the technological possibilities for control systems within the price limit $35." The ARB also inquired whether the manufacturers had an NOx device to offer and, if so, how efficient it would be in reducing NOx emissions.

26. Dana and other manufacturers provided the ARB with information concerning the availability and effectiveness of NOx devices which they had begun to develop as a result of the passage of the NOx Legislation. Using this

information, the ARB adopted standards for the accreditation of NOx devices at the ARB meeting on February 16, 1972.

27. The standards for certification required that an NOx device reduce NOx emissions from various classes of Subject Vehicles by a specified percentage rather than setting an absolute standard of maximum allowable emissions. The standards provided for certification of NOx devices which would reduce actual NOx emissions by 20% to 30%.

28. On March 31, 1972, the ARB again solicited the participation of manufacturers in the NOx emission reduction program It wrote to manufacturers:

> "Gentlemen:
>
> The Air Resources Board, as its meeting on April 19, 1972, at Sacramento, will take up the status of NOx control devices for 1966-70 light-duty vehicles.
>
> This subject has been discussed by the Board and the staff with members of the industry for some time. The Board and staff were led to believe that devices would be available if the State chose to require their installation.
>
> The legislature was likewise informed, and as a result passed SB 578, which requires installation of NOx devices on 1966-70 light-duty vehicles by January 1973. The bill was signed by the Governor on November 16, 1971 and on November 17 the Board adopted a test procedure for accreditation.
>
> We understand several companies have undertaken testing, but no application has yet been filed with the Board. The Board wishes to find out why there are no applications and what alternatives exist to comply with the law and will call upon your representative at the April 19th meeting to give a brief statement for your company on the subject."

29. At the ARB meeting on April 19, 1972, various manufacturers, including Dana, informed the ARB that they had devices which met the ARB standards and that the manufacturers would soon submit their data and applications.

30. Dana submitted an NOx device to the ARB for accreditation on or about May 11, 1972, supplying the required test data and other supporting information, including information relating to Dana's financial condition and distribution capabilities. At the ARB meeting on August 23, 1972, Dana's device was accredited by the ARB for all but one engine size classification and accredited on August 15, 1973 for that remaining engine size. At the August 23, 1972 meeting an NOx device, manufactured by The Echlin Company (hereinafter referred to as "Echlin") was accredited. At the August 23, 1972 meeting, one ARB member expressly stated that the Board was "asking the companies to embark on a massive program involving large sums of money."

31. The ARB thereafter resolved, pursuant to its statutory responsibility, that "the installation of the Dana corporation device shall become mandatory . . . when the Board finds that the device is available for installation." A similar resolution was passed with regard to the Echlin NOx device.

32. Pursuant to this resolution the ARB sought to develop a schedule for the required installation of NOx devices on the Subject Vehicles. At the ARB meeting of August 23, 1972, Dana and Echlin were requested to submit detailed information as soon as possible to the ARB on the time required to produce sufficient NOx devices, train installers and establish distribution channels.

33. At the ARB meeting on September 27, 1972, the ARB decided that Dana and Echlin would not be able to produce enough devices, or to establish distribution systems and train device installers in time to make NOx devices

available for all Subject Vehicles in February, 1973. Therefore, the ARB suspended the requirement that all Subject Vehicles be equipped with an NOx device by February, 1973, and established procedures for adopting a new schedule.

34. The ARB thereafter requested further information from Dana and Echlin concerning possible production, distribution and training schedules for the NOx devices. The ARB informed Dana and Echlin that a schedule would be adopted, requiring installation of NOx devices on the Subject Vehicles, if the manufacturers provided such information and committed themselves to produce the NOx devices within the specified times.

35. On or prior to November 21, 1972, Dana and Echlin agreed that they would produce and distribute sufficient NOx devices and conduct the other necessary activities, within a period necessary to meet a proposed installation schedule developed jointly by the ARB staff, other State officials and the manufacturers.

36. At the ARB meeting on November 21, 1972, the ARB adopted an installation schedule similar to the one proposed. The adopted installation schedule, a copy of which is attached hereto as Exhibit "1" and incorporated herein by reference, provided for the mandatory installation of NOx devices on all Subject Vehicles by May, 1974.

37. The ARB recognized that the implementation of this installation schedule would reduce NOx emissions in California by an average of 138 tons per day, in 1974, and by 180 tons per day, in 1975.

38. Relying upon this schedule for the mandatory installation of NOx devices, Dana produced and distributed NOx devices, and trained device installers, in accordance with its commitment to the ARB. A limited number of devices were installed pursuant to the schedule.

39. In June, 1973, the ARB repealed the installation schedule. In October, 1973, the ARB adopted a new installation schedule. It provided among other things, that all Subject Vehicles would be required to have an NOx device installed on or before December 1, 1974. A copy of this schedule is attached hereto as Exhibit "2" and incorporated herein by reference.

40. On November 16, 1973, the Governor of the State requested the ARB to reconsider the installation schedule because of an apparent energy shortage. He then filled an existing vacancy on the ARB and replaced three members of the ARB. On December 19, 1973, the newly constituted ARB adopted a Resolution delaying for at least one year the required installation of NOx devices on the Subject Vehicles.

41. On June 27, 1974 the Supreme Court of California, in an action brought by Dana, Echlin, and the Clean Air Constituency, issued a writ of mandamus directing the ARB to vacate its Resolution of December 19, 1973, on the ground that the NOx Legislation required the ARB to adopt and implement a schedule for the mandatory installation of NOx devices.

42. In July 1974, the ARB again adopted a schedule for mandatory installation of NOx devices on all Subject Vehicles. A copy of this schedule is attached hereto as Exhibit "3" and incorporated herein by reference.

43. On September 5, 1974, and again on April 23, 1975, defendants caused to be enacted certain amendments to the Air Resources Act, which repealed the provisions of the NOx Legislation requiring the rapid installation of NOx devices on all Subject Vehicles, and reduced, to an insignificant number, the number of motor vehicles upon which the NOx device was required to be installed.

FIRST CAUSE OF ACTION

(Breach of Contract)

44. Dana realleges and incorporates by reference herein all the allegations of paragraphs 1 through 43 above as though fully set forth at length.

45. In the course of and through the events, statements, and actions described in paragraph 5 through 43 above, as well as through other events, statements and acts, Defendants entered into a course of conduct designed to induce and encourage Dana to design and obtain accreditation for, and to induce, encourage and require Dana to manufacture and maintain an inventory of NOx emission control devices. It was the plan and requirement of Defendants that Dana develop NOx devices and manufacture and maintain an inventory of NOx devices before the NOx devices were first required to be installed on the Subject Vehicles. In pursuance of the aforesaid course of conduct, Defandants did, among other things, the following:

(a) Recruited, requested and encouraged Dana to design and submit an NOx device for accreditation;

(b) Based the accreditation of Dana's NOx device, in part, on a commitment by Dana that it could, and would, manufacture and maintain a large inventory of the NOx devices prior to the time installation of said devices was to be required, and on an investigation of Dana's financial ability to do so;

(c) Required Dana to manufacture and maintain a large inventory of NOx devices and to develop and carry out comprehensive training and distribution plans prior to the time installation of the devices was to be required;

(d) Represented and deliberately led Dana to believe that if Dana obtained accreditation for an NOx device and manufactured a large inventory, Defendants would require rapid installation of NOx devices on all

Subject Vehicles;

(e) Delayed installation schedules previously established, and on each such instance required plaintiff to manufacture and maintain an even larger inventory of NOx devices prior to the time installation of the devices was to be required.

46. Dana, in reliance on the representations, promises, actions and aforesaid course of conduct of Defendants, was induced and encouraged to and did design, obtain accreditation for, manufacture and maintain an inventory of NOx devices, expending in the process, considerable time, effort and money. In carrying out these actions, Dana, among other things:

(a) Assigned large numbers of professional personnel to this development and testing work;

(b) Conducted, and caused to be conducted, numerous costly tests on various automobiles;

(c) Manufactured a stock of the NOx devices sufficient for such testing and for submission to the ARB under its required procedures;

(d) Submitted to the ARB an application for accreditation in accord with ARB requirements for the control of NOx emissions in 1966-1970 vehicles, with the required test data and other supporting information, and in connection therewith, undertook certain affirmative commitments, including those required by the statute;

(e) Held numerous meetings with ARB personnel in the connection with the accreditation procedure;

(f) Having obtained accreditation on August 23, 1972, commenced planning for the manufacture, marketing, and installation of the devices, in cooperation and consultation with the ARB, its staff and other state officials;

(g) Established a sales and service group in California of up to 12 men in connection with the program

for distribution and installation of NOx devices;

(h) Allocated 19,000 square feet of Dana's manufacturing facility in Pueblo, Colorado for the purposes of stock accumulation, assembly and storage of the Dana NOx device;

(i) Hired 23 assemblers and material handlers and two supervisory personnel;

(j) Began full production on an expedited basis by January, 1973, in order to develop the inventory of NOx devices necessary to meet the requirements of the installation schedule;

(k) Developed a formal audio visual training program for Class A mechanics in the State of California based upon the recommendations of ARB staff;

(l) Conducted numerous seminars for Class A mechanics in the State of California between January 5, 1973 and June 1, 1973, training in excess of 10,000 Class A mechanics and associated automobile service people;

(m) Established a sales and customer service office within the State of California and engaged in a newspaper and radio campaign to disseminate information concerning both the Dana NOx device and the NOx device program for 1966-70 vehicles;

(n) Worked closely with the staff of the ARB and others in monitoring the installations on Subject Vehicles in the field during February and March of 1973 to resolve any possible problems as quickly as possible;

(o) Invested by January 1, 1974, in excess of $10,000,000 in the implementation of the Dana NOx device program as described above.

47. Defendants expressly requested Dana to design, obtain accreditation for, manufacture and maintain an inventory of NOx devices before the NOx devices were first required to be installed on the Subject Vehicles.

48. In conjunction with this request, Defendants promised Dana that Defendants would require that each Subject Vehicle be equipped with an accredited NOx device in a short period of time.

49. Dana, in reliance on aforesaid course of conduct of Defendants, and in expectation that each Subject Vehicle would be required to be equipped with an accredited NOx device in a short time and in expectation that Dana would be compensated for its services, expended considerable time, effort and money in the design, obtaining accreditation for, manufacture and maintenance of an inventory of NOx devices.

50. It was the intent of the Defendants and Dana and the principal inducement for Dana's expending the aforesaid time, money and effort that Defendants would require and continue to require each Subject Vehicle be equipped with an accredited NOx device once such devices were accredited and made available for installation.

51. Defendants materially and substantially breached the agreement stated above by the repeal of the NOx Legislation in such a manner as to reduce to an insignificant number the motor vehicles on which the NOx device was required to be installed without compensating Dana for the time, effort and money it had expended in designing, obtaining accreditation for, manufacturing and maintaining an inventory of the NOx devices.

52. As a direct and proximate result of said breach, Dana has been damaged in an amount not less than $13,000,000. The exact amount of such damage will be demonstrated by proof at trial.

53. With respect to the acts of Defendants in causing to be enacted on April 23, 1975 certain amendments to California Health and Safety Code Section 39177.1, plain-

tiff has complied with the claim requirements of Government Code Section 900 *et seq.* by filing with the State Board of control a claim for damages, and said claim was denied on April 20, 1976.

SECOND CAUSE OF ACTION

(Estoppel in Pais)

54. Dana realleges and incorporates by reference herein all the allegations of paragraphs 1-43, 45, 46 and 53 above as though fully set forth at length.

55. Defendants knew or should have known that as a result of the aforesaid course of conduct entered into by them, Dana would be induced and encouraged to, and would in fact, design, obtain accreditation for, manufacture and maintain an inventory of NOx devices before the NOx devices were first required to be installed on the Subject Vehicles.

56. As a result of the aforesaid course of conduct, Dana was made to believe and did believe that the carrying out of the schedule mandating rapid installation of NOx devices on all Subject Vehicles was certain of accomplishment once Dana had designed, obtained accreditation for, manufactured and maintained an inventory of such devices.

57. At no time prior to the expenditure of large amounts of time, effort and money by Dana was there any reason for Dana to believe that the State would abandon the requirement of rapid installation of NOx devices on all Subject Vehicles.

58. Acting solely upon the understanding that rapid installation of NOx devices on all Subject Vehicles would be required, Dana did each and every one of the acts described above. But for said understanding, Dana would not have so acted.

59. By the actions and the aforesaid courses of conduct carried out by Defendants, they were estopped to repeal the NOx Legislation in such a manner as to reduce to an insignificant number the motor vehicles on which the NOx device was to be installed without compensating Dana for the time, effort and money it expended in designing, obtaining accreditation for, manufacturing and maintaining an inventory of the NOx devices.

60. As a result of the foregoing actions by defendants, Dana has been damaged in an amount not less than $13,-000,000. The exact amount of such damage will be demonstrated by proof at trial.

THIRD CAUSE OF ACTION

(Promissory Estoppel)

61. Dana realleges and incorporates by reference herein all the allegations of paragraphs 1-43, 45, 46 and 53 above as though fully set forth at length herein.

62. Defendants, in making the aforesaid representations, and promises, did so with the knowledge that Dana would reasonably be induced to rely upon Defendants' representations and promises in that Dana would expend considerable time effort and money in designing, obtaining accreditation for, manufacturing and maintaining an inventory of NOx devices.

63. Dana in reasonble reliance upon Defendents' representations and promises was induced to expend considerable time, effort and money in designing, obtaining accreditation for, manufacturing and maintaining an inventory of NOx devices, and but for Defendants' representations and promises to Dana, Dana would not have so acted.

64. Dana, in reasonably relying upon Defendants' representations and promises has suffered a substantial detriment in that Dana has been damaged in an amount not less

than $13,000,000. The exact amount of such damage will be demonstrated by proof at trial.

FOURTH CAUSE OF ACTION

(Taking and Damaging of Property Without Compensation)

65. Dana realleges and incorporates by reference herein all of the allegations in paragraphs 1-43, 45-51 and 53 above as though fully set forth at length.

66. As a result of the foregoing actions by Defendants, the uses to which Dana's property can be put have been restricted to such an extent that Dana has been denied any substantial or reasonable use of its property.

67. As a further result of the foregoing actions by Defendants, the rights of Dana under its agreement with Defendants have been restricted and foreclosed to such an extent that Dana has been denied any substantial or reasonable benefit of its bargain.

68. Thus said property and contract rights have been taken without compensation and their value has been diminished and damaged by an amount not less than $13,000,000. The exact amount of such damage will be demonstrated by proof at trial.

69. Dana has not been compensated by the Defendants or any of them for the taking and damaging of its property and contract rights as aforesaid.

FIFTH CAUSE OF ACTION

(Quasi Contract — Implied in Law)

70. Plaintiff realleges and incorporates by reference herein all of the allegations of paragraphs 1-43, 45, 46 and 53 above as though fully set forth at length.

71. Defendants, in causing to be enacted the Air Resources Act and the NOx Legislation, and in carrying out the aforesaid course of conduct, expressly intended to induce, encourage and require Plaintiff to design, obtain accreditation for, manufacture and maintain an inventory of NOx devices.

72. Plaintiff, in reliance on the actions and aforesaid course of conduct of Defendants, and in expectation of being compensated for its services, expended considerable time, effort and money in designing, obtaining accreditation for, manufacturing and maintaining an inventory of NOx devices.

73. As a result of these services being rendered by Plaintiff, Defendants have been unjustly enriched by an as yet undetermined sum. When the exact amount of this sum is ascertained, Plaintiff will seek leave of this Court to amend its complaint and insert the correct figure.

74. Plaintiff has not been reimbursed for these services it performed at Defendant's request.

WHEREFORE, Dana prays judgment against Defendants, and each of them, jointly and severally with respect to each cause of action as follows:

1. The sum of $13,000,000 or such damages as may be shown at the time of trial;

2. For interest as provided by law;

3. For reasonable attorneys' fees and costs of suit in connection with the prosecution of this action; and

4. For such other and further relief as may be just and proper.

DATED: August 11, 1977.

PAUL, HASTINGS, JANOFSKY & WALKER

By /s/ Donald A. Daucher

Donald A. Daucher

Attorneys for Plaintiff

DANA CORPORATION

Echlin's First Amended Complaint.

Superior Court of the State of California, for the County of Los Angeles.

The Echlin Manufacturing Company, a corporation, Plaintiff, vs. State of California, the Legislature of the State of California, and Does I through XXV, Defendants. No. 176787.

Filed: Aug. 2, 1977.

1. At all times mentioned herein Plaintiff THE ECHLIN MANUFACTURING COMPANY (hereinafter referred to as "ECHLIN") was and now is a corporation organized and existing under the laws of the State of Connecticut, and authorized to do business in the State of California.

2. At all times mentioned herein Defendant STATE OF CALIFORNIA (hereinafter referred to as the "STATE") was and is a state of the United States of America.

3. At all times mentioned herein Defendant LEGISLATURE OF THE STATE OF CALIFORNIA (hereinafter referred to as the "LEGISLATURE") was and now is a governmental unit created by the California Constitution.

4. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants named herein as Does I through XXV are unknown to Plaintiff, which therefore sues said Defendants by such fictitious names. Plaintiff will amend this Complaint to show their names and capacities when the same have been ascertained. Hereinafter Defendants STATE, LEGISLATURE, and DOES I through XXV will be collectively referred to as "Defendants".

5. In the late 1960's, air pollution in California reached crisis levels. A significant contributor to this crisis was the emission of various pollutants from motor vehicles operating in the state.

6. In response to this crisis, Defendants caused to be enacted, in 1967, the Mulford-Carrell Air Resources Act (hereinafter referred to as the "Air Resources Act"), California Health and Safety Code §§ 39000 *et seq.* This act established the Air Resources Board (hereinafter referred to as the "ARB").

7. In further response to this crisis, Defendants caused to be enacted the Pure Air Act of 1968 (hereinafter referred to as the "Pure Air Act"), which amended the Air Resources Act to specifically require the reduction of pollution from motor vehicles.

8. In passing the Pure Air Act, the Defendants found:

"(a) That the emission of pollutants from motor vehicles is the primary cause of air pollution in many portions of the State.

(b) That the control and elimination of such pollutants is of prime importance for the protection and preservation of the public health and well-being, and for the prevention of irritation to the senses, interference with visibility, and damage of vegetation and property.

(c) That the State has a responsibility to establish uniform procedures for compliance with standards which control or eliminate such pollutants.

(d) That the California goal for pure air quality is the achievement of an atmosphere with no significant detectable adverse effect from motor vehicle air pollution on health, welfare and the quality of life and property by 1975.

(e) That vehicle emission standards applied to new motor vehicles and to used motor vehicles equipped with emission control devices are standards with which all such vehicles shall comply subject to the approval, accreditation, and certification provisions of this part." Ch. 764, §8 (1968) (Health and Safety Code, §39081).

9. The Pure Air Act required the ARB to accredit and certify for installation on automobiles, devices which reduced the emissions of each of three particular pollutants — carbon monoxide, hydrocarbons and oxides of nitrogen — below certain specifically defined absolute standards. Ch. 764, §8 (1968) (as amended, Health and Safety Code, §39107).

10. During the period from 1968 until 1971, vehicles manufactured in model years 1966 through 1970 (hereinafter referred to as "1966-1970 vehicles") were particularly significant polluters. Their factory installed pollution control equipment did reduce the emission of carbon monoxide and hydrocarbons, but caused a significant increase in the emission of oxides of nitrogen (hereinafter referred to as "NOx"), a primary component in the chemical reaction which leads to photochemical smog.

11. During the period from 1968 until 1971, devices to reduce NOx emissions (hereinafter referred to as "NOx device[s]") suitable for installation on 1966-1970 vehicles were not commercially available in California.

12. The Pure Air Act gave the ARB no authority to vary its emission device standards or accredit a device which reduced only NOx emissions.

13. During the period from 1968 until 1971, demand grew from various sources, including the Defendants, for action which would lead to the reduction of NOx emissions from 1966-1970 vehicles.

14. During the period from 1968 until 1971 the ARB and its staff consulted potential manufacturers to determine whether these manufacturers could develop, and make available, NOx devices for 1966-1970 vehicles.

15. The ARB was informed by potential manufacturers that NOx devices would be developed, and made available, if the law were changed to allow the accreditation of NOx

devices and to require the installation of accredited NOx devices on all 1966-1970 automobiles in California.

16. The ARB requested such legislation and supported its passage. In conformance with the ARB request, the Legislature, in November, 1971, amended the Air Resources Act, Ch. 1507 (1971) (said amendment is hereinafter referred to as the "NOx Legislation").

17. One purpose of the NOx Legislation was to encourage and induce the development, accreditation and production of NOx devices by manufacturers by requiring the installation of such devices as soon as they were available. Its urgency section provided:

> "This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting necessity are:
>
> Presently required emission control devices for motor vehicles of 1966 through 1970 models do not eliminate enough of the oxides of nitrogen to insure the health and safety of the majority of California citizens. It is now technically feasible to produce devices which will significantly reduce these dangerous substances. To insure that such devices are installed on most of such passenger vehicles within the shortest time possible, it is necessary to immediately begin programs for testing and approving such devices. Immediate passage of this act will also give manufacturers additional time to develop such devices." Ch. 1507, §8 (1971).

18. The NOx Legislation vested the ARB with the authority to accredit NOx devices for installation on 1966-1970 vehicles having a manufacturer's gross vehicle weight rating of under 6,001 pounds (hereinafter referred to as "Subject Vehicles"). It further required every Subject Vehicle to be equipped with an NOx device in accordance with

a schedule to be developed by the ARB. The NOx Legislation specifically required that all Subject Vehicles be equipped with a device upon renewal of registration in 1973, absent extraordinary and compelling reasons.

19. The NOx Legislation set no absolute standards for the reduction of NOx. Instead, it sought to encourage the development of the best possible devices, given the constraints of urgency and of technological and economic feasibility.

20. To accomplish this purpose, the ARB was authorized to determine the standard for NOx reduction necessary for accreditation of an NOx device:

> "Notwithstanding [Health and Safety Code] Section 39107, [which had set a specifically defined absolute NOx standard,] the board shall set standards for devices to significantly reduce the emission of oxides of nitrogen from 1966 through 1970 model year vehicles, as determined by the board from a representative sampling of such vehicles, which the board has found necessary and technologically feasible to carry out the purposes of this part.
>
> In setting standards under this Section, the primary consideration shall be the greatest possible reduction of oxides of nitrogen." Ch.1507, §1 (1971).

21. To further accomplish this purpose, the NOx Legislation provided that no NOx device could be accredited which was less effective than any already accredited.

22. For several months prior to the passage of the NOx Legislation and in anticipation thereof, the ARB consulted with potential manufactures to develop procedures for evaluating NOx devices and to implement an NOx reduction program.

23. At the ARB meeting on November 17, 1971, the ARB adopted procedures for evaluting NOx devices. At the

same meeting, the ARB, speaking through its Chairman, noted the passage of the NOx Legislation and urged "the auto industry to submit devices for approval at an early date since many of the manufacturers indicated they would do so if the law were changed."

24. Standards for the reduction of NOx emissions required for accreditation of NOx devices were not set at the November 17 meeting because the ARB did not possess sufficient information on the effectiveness of NOx devices which would be technologically and economically feasible. Thereafter, the ARB continued its solicitation of information from manufacturers with regard to potential NOx devices. In December, 1971, the ARB wrote various manufacturers stating, "[b]efore setting standards for [NOx] devices, the Board wishes to know the technological possibilities for control systems within the price limit $35." The ARB also inquired whether the manufacturers had an NOx device to offer and, if so, how efficient it would be in reducing NOx emissions.

25. ECHLIN and other manufacturers provided the ARB with information concerning the availability and effectiveness of NOx devices which they had begun to develop as a result of the passage of the NOx Legislation. Using this information, the ARB adopted standards for the accreditation of NOx devices at the ARB meeting on February 16, 1972.

26. The standards for certification required that an NOx device reduce NOx emissions from various classes of Subject Vehicles by a specified percentage rather than setting an absolute standard of maximum allowable emissions. The standards provided for certification of NOx devices which would reduce actual NOx emissions by 20% to 30%.

27. On March 31, 1972, the ARB again solicited the participation of manufacturers in the NOx emission reduction program. It wrote to manufacturers:

"Gentlemen:

The Air Resources Board, at its meeting on April 19, 1972, at Sacramento, will take up the status of NOx control devices for 1966-70 light-duty vehicles.

This subject has been discussed by the Board and the staff with members of the industry for some time. The Board and staff were led to believe that devices would be available if the State chose to require their installation.

The legislature was likewise informed, and as a result passed SB 578, which requires installation of NOx devices on 1966-70 light-duty vehicles by January 1973. The bill was signed by the Governor on November 16, 1971 and on November 17 the Board adopted a test procedure for accreditation.

We understand several companies have undertaken testing, but no application has yet been filed with the Board. The Board wishes to find out why there are no applications and what alternatives exist to comply with the law and will call upon your representative at the April 19th meeting to give a brief statement for your company on the subject."

28. At the ARB meeting on April 19, 1972, various manufacturers, including ECHLIN, informed the ARB that they had devices which met the ARB standards and that the manufacturers would soon submit their data and applications.

29. ECHLIN submitted an NOx device to the ARB for accreditation on April 21, 1972, supplying the required test data and other supporting information, including information relating to ECHLIN's financial condition and distribution capabilities. At the ARB meeting on August 23, 1972, ECHLIN's device was accredited by the ARB. At the same meeting, an NOx device manufactured by the Dana Corporation (hereinafter referred to as "DANA") was accredited. At that meeting, one ARB member expressly stated

that the Board was "asking the companies to embark on a massive program involving large sums of money."

30. The ARB thereafter resolved, pursuant to its statutory responsibility, that "the installation of the Echlin corporation devices shall become mandatory . . . when the Board finds that the device is available for installation." A similar resolution was passed with regard to the DANA NOx device.

31. Pursuant to this resolution the ARB sought to develop a schedule for the required installation of NOx devices on the Subject Vehicles. At the ARB meeting of August 23, 1972, ECHLIN and DANA were requested to submit detailed information as soon as possible to the ARB on the time required to produce sufficient Nox devices, train installers and establish distribution channels.

32. At the ARB meeting on September 27, 1972, the ARB decided that ECHLIN and DANA would not be able to produce enough devices, or to establish distribution systems and train device installers in time to make NOx devices available for all Subject Vehicles by February, 1973. Therefore, the ARB suspended the requirement that all Subject Vehicles be equipped with an NOx device by February, 1973, and established procedures for adopting a new schedule.

33. The ARB thereafter requested further information from ECHLIN and DANA concerning possible production, distribution and training schedules for the NOx devices. The ARB informed ECHLIN and DANA that a schedule would be adopted, requiring installation of NOx devices on the Subject Vehicles, if the manufacturers provided such information and committed themselves to produce the NOx devices within the specified times.

34. On or prior to November 21, 1972, ECHLIN and DANA agreed that they would produce and distribute suf-

ficient NOx devices and conduct the other necessary activities, within a period necessary to meet a proposed installation schedule developed jointly by the ARB staff, other State officials and the manufacturers.

35. At the ARB meeting on November 21, 1972, the ARB adopted an installation schedule similar to the one proposed. The adopted installation schedule, a copy of which is attached hereto as Exhibit "1" and incorporated herein by reference, provided for the mandatory installation of NOx devices on all Subject Vehicles by May, 1974.

36. The ARB recognized that the implementation of this installation schedule would reduce NOx emissions in California by an average of 138 tons per day, in 1974, and by 180 tons per day, in 1975.

37. Relying upon this schedule for the mandatory installation of NOx devices, ECHLIN produced and distributed NOx devices, and trained device installers, in accordance with its commitment to the ARB. A limited number of devices were installed pursuant to the schedule.

38. In June, 1973, the ARB repealed the installation schedule. In October, 1973, the ARB adopted a new installation schedule. It provided among other things, that all Subject Vehicles would be required to have an NOx device installed on or before December 1, 1974. A copy of this schedule is attached hereto as Exhibit "2" and incorporated herein by reference.

39. On November 16, 1973, the Governor of the State requested the ARB to reconsider the installation schedule because of an apparent energy shortage. He then filled an existing vacancy on the ARB and replaced three members on the ARB. On December 19, 1973, the newly constituted ARB adopted a Resolution delaying for at least one year

the required installation of NOx devices on the Subject Vehicles.

40. On June 27, 1974, the Supreme Court of California, in an action brought by ECHLIN, DANA, and the Clean Air Constituency, issued a writ of mandamus directing the ARB to vacate its Resolution of December 19, 1973, on the ground that the NOx Legislation required the ARB to adopt and implement a schedule for the mandatory installation of NOx devices.

41. In July 1974, the ARB again adopted a schedule for mandatory installation of NOx devices on all Subject Vehicles. A copy of this schedule is attached hereto as Exhibit "3" and incorporated herein by reference.

42. On September 5, 1974, and again on April 23, 1975, defendants caused to be enacted certain amendments to the Air Resources Act, which repealed the provisions of the NOx Legislation requiring the rapid installation of NOx devices on all Subject Vehicles, and reduced, to an insignificant number, the number of motor vehicles upon which the NOx device was required to be installed.

FIRST CAUSE OF ACTION

(Breach of Contract)

43. ECHLIN realleges and incorporates by reference herein all the allegations of paragraphs 1 through 42 above as though fully set forth at length.

44. In the course of and through the events, statements, and actions described in paragraphs 6 through 42 above, as well as through other events, statements and acts, Defendants entered into a course of conduct designed to induce and encourage ECHLIN to design and obtain accreditation for, and to induce, encourage and require ECHLIN to manufacture and maintain an inventory of NOx emission control devices. It was the plan and requirement of Defendants that

ECHLIN develop NOx devices and manufacture and maintain an inventory of NOx devices before the NOx devices were first required to be installed on the Subject Vehicles. In pursuance of the aforesaid course of conduct, Defendants did, among other things, the following:

(a) Recruited, requested and encouraged ECHLIN to design and submit an NOx device for accreditation;

(b) Based the accreditation of ECHLIN's NOx device, in part, on a commitment by ECHLIN that it could, and would, manufacture and maintain a large inventory of the NOx devices prior to the time installation of said devices was to be required, and on an investigation of ECHLIN's financial ability to do so;

(c) Required ECHLIN to manufacture and maintain a large inventory of NOx devices and to develop and carry out comprehensive training and distribution plans prior to the time installation of the devices was to be required;

(d) Represented and deliberately led ECHLIN to believe that if ECHLIN obtained accreditation for an NOx device and manufactured a large inventory, Defendants would require rapid installation of NOx devices on all Subject Vehicles.

(e) Delayed installation schedules previously established, and on each such instance required ECHLIN to manufacture and maintain an even larger inventory of NOx devices prior to the time installation of the devices was to be required.

45. ECHLIN, in reliance on the representations, promises, actions and aforesaid course of conduct of Defendants was induced and encouraged to and did design, obtain accreditation for, manufacture and maintain an inventory of NOx devices, expending in the process, considerable time, effort and money. In carrying out these actions, ECHLIN among other things:

(a) Established a completely equipped research laboratory for the development and testing of an NOx device;

(b) Assigned large numbers of professional personnel to this development and testing work;

(c) Conducted, and caused to be conducted, numerous costly tests on various automobiles;

(d) Manufactured a stock of the NOx devices sufficient for such testing and for submission to the ARB under its required procedures;

(e) Submitted to the ARB an application for accreditation in accord with ARB requirements for the control of NOx emissions in 1966-1970 vehicles, with the required test data and other supporting information, and in connection therewith, undertook certain affirmative commitments, including those required by the statute;

(f) Held numerous meetings with ARB personnel in connection with the accreditation procedure;

(g) Having obtained accreditation on August 23, 1972, commenced planning for the manufacture, marketing, and installation of the devices, in cooperation and consultation with the ARB, its staff and other state officials;

(h) Established a field service engineering group in California of 11 men in connection with the program for distribution and installation of NOx devices;

(i) Allocated 5,000 square feet of ECHLIN's manufacturing facility in Branford, Connecticut for the purposes of stock accumulation, assembly and storage of the ECHLIN NOx device;

(j) Hired 20 assemblers and material handlers and two supervisory personnel;

(k) Began full production on an expedited basis by December, 1972, in order to develop the inventory of NOx devices necessary to meet the requirements of the

installation schedule;

(l) Developed a formal audio visual training program for Class A mechanics in the State of California based upon the recommendations of ARB staff;

(m) Conducted 673 seminars for Class A mechanics in the State of California between January 5, 1973 and June 1, 1973, training approximately 11,700 Class A mechanics and associated automobile service people;

(n) Employed 15 field service engineers and technical service people for the purpose of conducting the training program and doing the follow-up consumer service work in the field;

(o) Established consumer and customer service offices within the State of California and engaged in a newspaper campaign to disseminate information concerning both the ECHLIN NOx device and the NOx device program for 1966-1970 vehicles;

(p) Worked closely with the staff of the ARB and others in monitoring the installations on Subject Vehicles in the field during February and March of 1973 to resolve any possible problems as quickly as possible;

(q) Moved its production facilities for the ECHLIN NOx device from Connecticut to new, expanded facilities at Huntington Beach, California to better serve the requirements of the installation schedule;

(r) Hired 22 manufacturing employees in California and made improvements to accommodate production;

(s) Invested by January 1, 1974, approximately $5,000,000 in the implementation of the ECHLIN NOx device program as described above.

46. Defendants expressly requested ECHLIN to design, obtain accreditation for, manufacture and maintain an inventory of NOx devices before the NOx devices were first required to be installed on the Subject Vehicles.

47. In conjunction with this request, Defendants promised ECHLIN that Defendants would require that each Subject Vehicle be equipped with an accredited NOx device in a short period of time.

48. ECHLIN, in reliance on aforesaid course of conduct of Defendants, and in expectation that each Subject Vehicle would be required to be equipped with an accredited NOX device in a short time and in expectation that ECHLIN would be compensated for its services, expended considerable time, effort and money in the design, obtaining accreditation for, manufacture and maintenance of an inventory of NOx devices.

49. It was the intent of the Defendants and ECHLIN and the principal inducement for ECHLIN's expending the aforesaid time, money and effort that Defendants would require and continue to require that each Subject Vehicle be equipped with an accredited NOx device once such devices were accredited and made available forinstallation.

50. Defendants materially and substantially breached the agreement stated above by the repeal of the NOx Legislation in such a manner as to reduce to an insignificant number the motor vehicles on which the NOx device was required to be installed without compensating ECHLIN for the time, effort and money it had expended in designing, obtaining accreditation for, manufacturing and maintaining an inventory of the NOx devices.

51. As a direct and proximate result of said breach, ECHLIN has been damaged in an amount not less than $5,000,000, The exact amount of such damage will be demonstrated by proof at trial.

52. With respect to the acts of Defendants in causing to be enacted on April 23, 1975, certain amendments to California Health and Safety Code Section 39177.1, ECH-

LIN has complied with the claim requirements of Government Code Section 900 *et seq.* by filing with the State Board of Control a claim for damages, and said claim was denied on April 20, 1976.

SECOND CAUSE OF ACTION

(Estoppel in Pais)

53. ECHLIN realleges and incorporates by reference herein all the allegations of paragraphs 1-42, 44, 45 and 52 above as though fully set forth at length.

54. Defendants knew or should have known that as a result of the aforesaid course of conduct entered into by them, ECHLIN would be induced and encouraged to, and would in fact, design, obtain accreditation for, manufacture and maintain an inventory of NOx devices before the NOx devices were first required to be installed on the Subject Vehicles.

55. As a result of the aforesaid course of conduct, ECHLIN was made to believe and did believe that the carrying out of the schedule mandating rapid installation of NOx devices on all Subject Vehicles was certain of accomplishment once ECHLIN had designed, obtained accreditation for, manufactured and maintained an inventory of such devices.

56. At no time prior to the expenditure of large amounts of time, money and effort by ECHLIN was there any reason for ECHLIN to believe that the STATE would abandon the requirement of rapid installation of NOx devices on all Subject Vehicles.

57. Acting solely upon the understanding that rapid installation of NOx devices on all Subject Vehicles would be required, ECHLIN did each and every one of the acts described above. But for said understanding, ECHLIN would not have so acted.

58. By the actions and the aforesaid course of conduct carried out by Defendants, they were estopped to repeal the NOx Legislation in such a manner as to reduce to an insignificant number the motor vehicles on which the NOx device was to be installed without compensating ECHLIN for the time, effort and money it expended in designing, obtaining accreditation for, manufacturing and maintaining an inventory of the NOx devices.

59. As a result of the foregoing actions by Defendants, ECHLIN has been damaged in an amount not less than $5,000,000. The exact amount of such damage will be demonstrated by proof at trial.

THIRD CAUSE OF ACTION

(Promissory Estoppel)

60. ECHLIN realleges and incorporates by reference herein all the allegations of paragraphs 1-42, 44, 45 and 52 above as though fully set forth at length.

61. Defendants, in making the aforesaid representations and promises, did so with the knowledge that ECHLIN would reasonably be induced to rely upon Defendants' representations and promises in that ECHLIN would expend considerable time, effort and money in designing, obtaining accreditation for, manufacturing and maintaining an inventory of NOx devices.

62. ECHLIN in reasonable reliance upon Defendants' representations and promises was induced to expend considerable time, effort and money in designing, obtaining accreditation for, manufacturing and maintaining an inventory of NOx devices, and but for Defendants' representations and promises to ECHLIN, ECHLIN would not have so acted.

63. ECHLIN, in reasonably relying upon Defendants' representations and promises has suffered a substantial det-

riment in that ECHLIN has been damaged in an amount not less than $5,000,000. The exact amount of such damage will be demonstrated by proof at trial.

FOURTH CAUSE OF ACTION

(Taking and Damaging of Property Without Compensation)

64. ECHLIN realleges and incorporates by reference herein all of the allegations in paragraphs 1-42, 44-50 and 52 above as though fully set forth at length.

65. As a result of the foregoing actions by Defendants, the uses to which ECHLIN's property can be put have been restricted to such an extent that ECHLIN has been denied any substantial or reasonable use of its property.

66. As a further result of the foregoing actions by Defendants, the rights of ECHLIN under its agreement with Defendants have been restricted and foreclosed to such an extent that ECHLIN has been denied any substantial or reasonable benefit of its bargain.

67. Thus said property and contract rights have been taken without compensation and their value has been diminished and damaged by an amount not less than $5,000,000. The exact amount of such damage will be demonstrated by proof at trial.

68. ECHLIN has not been compensated by the Defendants or any of them for the taking and damaging of its property and contract rights as aforesaid.

FIFTH CAUSE OF ACTION

(Quasi Contract — Implied in Law)

69. Plaintiff realleges and incorporates by reference herein all of the allegations of paragraphs 1-42, 44, 45 and 52 above as though fully set forth at length.

70. Defendants, in causing to be enacted the Air Resources Act and the NOx Legislation, and in carrying out the aforesaid course of conduct, expressly intended to induce, encourage and require Plaintiff to design, obtain accreditation for, manufacture and maintain an inventory of NOx devices.

71. Plaintiff, in reliance on the actions and aforesaid course of conduct of Defendants, and in expectation of being compensated for its services, expended considerable time, effort and money in designing, obtaining accreditation for, manufacturing and maintaining an inventory of NOx devices.

72. As a result of these services being rendered by Plaintiff, Defendants have been unjustly enriched by an as yet undetermined sum. When the exact amount of this sum is ascertained, Plaintiff will seek leave of this Court to amend its complaint and insert the correct figure.

73. Plaintiff has not been reimbursed for these services it performed at Defendant's request.

WHEREFORE, ECHLIN prays judgment against Defendants, and each of them, jointly and severally, with respect to each Cause of Action, as follows:

1. The sum of $5,000,000 or such damages as may be shown at the time of trial;

2. For interest as provided by law;

3. For reasonable attorneys' fees and costs of suit in connection with the prosecution of this action; and

4. For such other and further relief as may be just and proper.

DATED: July 31, 1977

MUNGER, TOLLES & RICKERSHAUSER
Dennis C. Brown
Jonathan B. Marks

By /s/ Dennis C. Brown
Dennis C. Brown
Attorneys for Plaintiffs

THE ECHLIN MANUFACTURING COMPANY

VERIFICATION

State of California, County of Los Angeles—ss.

I, DENNIS C. BROWN, declare as follows:

1. I am an attorney at law duly admitted and licensed to practice before all of the courts of the State of California, and am a member of the firm of Munger, Tolles & Rickershauser, attorneys for Plaintiff The Echlin Manufacturing Company in the above-entitled action.

2. Said Plaintiff is absent from the county in which I have my office, and for that reason I am making this verification on its behalf.

3. I have read the foregoing FIRST AMENDED COMPLAINT FOR DAMAGES of The Echlin Manufacturing Company, and know the contents thereof.

4. I am informed and believe that the matters stated therein are true, and on that ground I allege that the matters stated therein are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of July, 1977 at Los Angeles, California.

/s/ Dennis C. Brown
Dennis C. Brown

In the Court of Appeal, Second Appellate District, State of California.

Dana Corporation and The Echlin Manufacturing Company, Appellants, vs. State of California, and Legislature of the State of California, et al., Appellees.

Notice of Appeal to the Supreme Court of the United States.

Filed: August 1: 1980.

Paul, Hastings, Janofsky & Walker, Dennis H. Vaughn, Donald A. Daucher, Donald L. Morrow, Steven C. Kenninger. 555 South Flower Street, 22nd Floor, Los Angeles, California 90071, (213) 489-4000. Attorneys for Appellant, Dana Corporation.

Munger, Tolles & Rickerschauser, Dennis C. Brown, 612 South Flower Street, 5th Floor, Los Angeles, California 90016, (213) 683-9100. Attorneys for Appellant, The Echlin Manufacturing Company.

In the Court of Appeal, Second Appellate District, State of California.

Dana Corporation and The Echlin Manufacturing Company, Appellants, vs. State of California and Legislature of the State of California, et al., Appellees.

Notice of Appeal to the Supreme Court of the United States.

NOTICE IS HEREBY GIVEN that Dana Corporation and The Echlin Manufacturing Company, the Appellants named above, hereby appeal to the Supreme Court of the United States from the final judgment the California Court of Appeal, Second Appellate District entered in this action on March 13, 1980 which judgment affirmed the Los Angeles Superior Court's dismissal of the Appellants' complaints without leave to amend and as to which judgment the California Supreme Court denied a hearing on May 8, 1980.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2). DATED: August 1, 1980.

PAUL, HASTINGS, JANOFSKY & WALKER,
DENNIS H. VAUGHN,
DONALD A. DAUCHER,

DONALD L. MORROW,
STEVEN C. KENNINGER,
By DONALD A. DAUCHER,
Attorneys for Appellant,
DANA CORPORATION.

MUNGER, TOLLES &
RICKERSCHAUSER,
DENNIS C. BROWN,
By DENNIS C. BROWN,
Attorneys for Appellant,
THE ECHLIN MANUFACTURING
COMPANY.

Verification.

Proof of Service by Mail.

State of California, County of Orange.

I am employed in the county of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 695 Town Center Drive, 17th Floor, Costa Mesa, California On August 1 1980 I served the foregoing document described as NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Costa Mesa.

Addressed as follows:

Dennis C. Brown, Esq., MUNGER, TOLLES & RICKERSCHAUSER, 612 South Flower St., 5th Floor, Los Angeles, Calif. 90017.

Philip M. Brown, Esq., EGERMAN, BROWN & ROSEN, 9100 Wilshire Blvd., Beverly Hills, Calif. 90012.

Saul Grayson, Esq., GRAYSON, GROSS, FRIEDMAN, PHILLIPS & RASCH, 10880 Wilshire Blvd., Suite 2121, Los Angeles, Calif. 90024.

Joel S. Moskowitz, Esq., Deputy Attorney General, DEPARTMENT OF JUSTICE, 555 Capitol Mall, Suite 350, Sacramento, Calif. 95814.

Executed on August 1 1980 at Costa Mesa, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/JAN SELLINGER
JAN SELLINGER

In the Supreme Court of the State of California.

Dana Corporation and The Echlin Manufacturing Company, Appellants, vs. State of California, and Legislature of the State of California, et al., Appellees.

Notice of Appeal to the Supreme Court of the United States.

Paul, Hastings, Janofsky & Walker, Dennis H. Vaughn, Donald A. Daucher, Donald L. Morrow, Steven C. Kenninger, 555 South Flower Street, 22nd Floor, Los Angeles, California 90071, (213) 489-4000. Attorneys for Appellant, Dana Corporation.

Munger, Tolles & Rickerschauser, Dennis C. Brown. 612 South Flower Street, 5th Floor, Los Angeles, California 90016, (213) 683-9100. Attorneys for Appellant, The Echlin Manufacturing Company.

In the Supreme Court of the State of California.

Dana Corporation and The Echlin Manufacturing Company, Appellants, vs. State of California and Legislature of the State of California, et al., Appellees.

Notice of Appeal to the Supreme Court of the United States.

NOTICE IS HEREBY GIVEN that Dana Corporation and The Echlin Manufacturing Company, the Appellants named above, hereby appeal to the Supreme Court of the United States from the final judgment the California Court of Appeal, Second Appellate District entered in this action on March 13, 1980 which judgment affirmed the Los Angeles Superior Court's dismissal of the Appellants' complaints

without leave to amend and as to which judgment the California Supreme court denied a hearing on May 8, 1980.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2). DATED: August 1, 1980.

PAUL, HASTINGS, JANOFSKY & WALKER,
DENNIS H. VAUGHN,
DONALD A. DAUCHER,
DONALD L. MORROW,
STEVEN C. KENNINGER,
By DONALD A. DAUCHER,
Attorneys for Appellant,
DANA CORPORATION.

MUNGER, TOLLES & RICKERSCHAUSER,
DENNIS C. BROWN,
By DENNIS C. BROWN,
Attorneys for Appellant,
THE ECHLIN MANUFACTURING COMPANY.

Verification.

Proof of Service by Mail.

State of California, County of Orange.

I am employed in the county of Orange, State of California I am over the age of 18 and not a party to the within action; my business address is 695 Town Center Drive, 17th Floor, Costa Mesa, California. On August 1, 1980, I served the foregoing document described as NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Costa Mesa.

addressed as follows:

Dennis C. Brown, Esq., MUNGER, TOLLES & RICKERSCHAUSER, 612 South Flower Street, 5th Floor, Los Angeles, Calif. 90017.

Philip M. Brown, Esq., EGERMAN, BROWN & ROSEN, 9100 Wilshire Blvd., Beverly Hills, Calif. 90012.

Saul Grayson, Esq., GRAYSON, GROSS, FRIEDMAN, PHILLIPS & RASCH, 10880 Wilshire Boulevard, Suite 2121, Los Angeles, Calif. 90024.

Joel S. Moskowitz, Esq., Deputy Attorney General, DEPARTMENT OF JUSTICE, 555 Capitol Mall, Suite 350, Sacramento, Calif. 95814.

Executed on August 1, 1980 at Costa Mesa, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/JAN SELLINGER
JAN SELLINGER